SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 888

HARRAH'S CLUB,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari

To the United States Court of Appeals for the Ninth Circuit

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No. .....

HARRAH'S CLUB,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari

To the United States Court of Appeals for the Ninth Circuit

Petitioner, Harrah's Club, a Nevada corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 11, 1966.[1]

OPINIONS BELOW

The opinion of the court of appeals (Appendix B, infra, pp. 7-14) is officially reported at 362 F. 2d 425. The Board's decision and order (Appendix C, infra., pp. 15-16) is reported at 150 NLRB 1702.

1. The opinion of the court below was handed down June 14, 1966. The decree enforcing the Board's order was entered July 11, 1966, and order denying rehearing was entered August 5, 1966.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1966 (Appendix A, infra., pp. 1-4). On October 17, 1966, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including December 20, 1966. This court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Board arbitrarily and discriminatorily in violation of the due process clause of the Fifth Amendment of the Constitution of the United States, and to the prejudice of petitioner, asserted jurisdiction over petitioner, an operation in the gaming industry wholly within a single state (Nevada), while for identical reasons the Board declined to assert jurisdiction over the racing industry, an industry in competition with the gaming industry.

2. Whether the Court below gave mere lip service to this court's mandate in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix D, infra, pp. 41-43.

STATEMENT OF THE CASE

Petitioner is engaged in operating gaming casinos in Reno and Stateline (Lake Tahoe), Nevada. It also has food and bevarage facilities in connection with its operations as an accommodation to its patrons (R. 14-15; Tr. 321-322, 5-6).[2]

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2. "R" references are to Volume I of the record in the court below; "Tr." references are to the transcript of testimony in Volume II of that record; references designated "G.C.X." or "R.X." are to the exhibits of the General Counsel and the petitioner, respectively. A copy of this material has been filed with this petition.

At its Stateline casino petitioner has a large room (South Shore Room) in which it serves dinners and presents performances for the entertainment of its patrons (R. 14-15).

On or about July 1, 1963, one of the supervisors at Stateline who had certain responsibilities for the entertainment received a letter from an employee who was on military leave overseas. This veteran wrote that he had "dreamed of the day when I can leave here and return to Lake Tahoe", and that he should be out of the service by the end of August and "ready to go to work sometime around the end of August" (G.C.X. 3(a) & (b)). This veteran had been employed prior to his military service as a stage technician in the South Shore Room (Tr. 171-172).

In the early part of August, 1963, petitioner received a letter from the Regional Director of the Bureau of Veteran's Re-Employment Rights, United States Department of Labor, stating the veteran had recently been released from military service and that at "the time of separation he requested specific information about his reemployment rights; it is possible that he already has been in touch with you." The letter also stated that the Bureau desired "to be of service both to you and to this ex-serviceman if he desires to return in accordance with reemployment legislation." Accompanying this letter was a form requesting information as to "pay, promotional opportunities, and other benefits based on seniority accrued during his service in the armed forces" (R.X.1). Petitioner completed and returned the form to the Bureau (Tr. 337-338).

This was the first such matter which petitioner had ever handled. The problem was discussed between supervision in the entertainment department and the director of industrial relations as to how to comply with "the mandate of the law". Since petitioner could not absorb another man on its stage crew, it was determined that one of the crew

would have to go to make an opening for the returning veteran (Tr. 339). The logical one to go would be the one with the least seniority in the entertainment department of which the stage crew was a part (Tr. 340). The personnel records of that department were reviewed and it appeared that Robert Wetherill, a member of the stage crew, had the least seniority in that department (Tr. 340-341, 559-560).

Sometime about the middle of August, 1963, the veteran telephoned the supervisor to whom he had written and arranged to come to Lake Tahoe the next day for a conference concerning his return to his job. At the conference, the veteran told supervision he wanted to report back on the job about September 1. This was agreeable to supervision. The veteran left both his current address and two telephone numbers where he could be reached should he be wanted back sooner (Tr. 176-178).

On August 30, because of an important production number to be presented in the South Shore Room, it was deemed desirable to have the veteran return a day or so sooner so he could participate in tearing down of the old show and setting up the new show. This would enable him to become acquainted with the new show which would run through part of September, the month in which he wanted to return to his job. Supervision telephoned the veteran and asked him to report the next day. He did so and was put to work (Tr. 178-179, 710).

After the second show in the early morning of September 1, and in accordance with the custom and practice not only at petitioner's operations but also in the gaming industry, Wetherill was informed by supervision of the necessity to terminate him and the reasons therefor (Tr. 27-29, 705, 707, 721-22, 844-45, 849-52, 855-56, 868-70). Wetherill, who among others in his department had engaged in union activity, asked if his discharge had anything to do with such

activity. Supervision assured him this had nothing to do with it (Tr. 706-709). A termination slip was given Wetherill which stated the reason for termination was "to make room for a returning serviceman" (Tr. 120).

Thereafter Wetherill requested and received a hearing before a board of review which unanimously upheld the termination. The board of review consisted of three members, an employee representative elected by the employees in the entertainment department by secret ballot, a representative of the club (petitioner), and the director of industrial relations (R. 38, n. 40; Tr. 31-32, 305).

Subsequently unfair labor practice charges were filed alleging petitioner violated sections 8(a)(1) and (3) of the National Labor Relations Act in discharging Wetherill. A complaint was issued and a formal hearing was held before a Trial Examiner who made findings that the Board had and could assert jurisdiction over petitioner and findings supporting the charge although he found there was no question "regarding Walker's [the veteran] seniority or his right to the job" (R. 41) and although he found that petitioner's stage crew was "already over-staffed", and that supervision "was being criticized for maintaining a much larger stage crew than any comparable casino in Las Vegas". (R. 41). Exceptions and a brief in support were filed with the Board by petitioner. The Board rendered a decision in which it rejected petitioner's contention as to jurisdiction and as to the findings and recommendations by the Trial Examiner. Completely ignoring its decisions in cases involving the racing industry, the Board asserted jurisdiction on the very rationale which it used to decline jurisdiction over the racing industry. The Board's position is that the matter of jurisdiction lies solely within its discretion (R. 57-58, 48-50). The Board ordered petitioner to reinstate Wetherill with back pay and without

prejudice to his seniority and other rights and privileges (Appendix C, infra, pp. 16 and 39, R. 49-50).

The Court of appeals enforced the Board's Order. It held that "assuming that the criteria applied by the Board in determining to exempt racetracks from regulation are equally applicable to gambling casinos in Nevada, this alone is not sufficient to establish that regulation of the gambling industry will result in unjust discrimination. It must also be shown that the gambling industry will be substantially prejudiced by Board regulation because racetracks are not similarly regulated." The court below concluded "there is nothing in the record to support a finding or conclusion that such prejudice will result." It then went on to state that the record as a whole supports the Trial Examiner's ultimate finding adopted by the Board (Appendix B, infra, pp. 17-40).

REASON FOR GRANTING THE WRIT

1. During the course of the oral argument before the court below, the presiding judge made the observation that the whole issue of the Board's jurisdiction was "a fuzzy one". One of the other judges on the panel expressed the view that the matter of the Board's jurisdiction should probably be handled "politically". The issue is important not only to petitioner but to the Board's administration of the Act and to all businesses which may come within reach of the Board. There are at present approximately fifteen unfair labor practice cases at various stages in which complaints have been issued by the General Counsel of the Board against gaming casinos in Nevada and approximately twelve representation cases. In several of the complaint cases, the Board has issued a decision and order requiring casinos to undertake certain affirmative action and to take other negative action. These latter cases will soon reach the court of appeals and the others in all probability will also

in the near future. It thus becomes imperative that there be a definitive decision by this court to serve as a guide to the public, the courts of appeals, and the Board on this crucial issue of the Board's jurisdiction.

The jurisdictional question decided in this case is a difficult, important, and recurring one in the administration of the federal labor laws. The answer given by the court below and the Board confuses rather than clarifies and appears to be in conflict with applicable decisions of this court and erroneous. Moreover, the jurisdictional issue here is of equal, if not greater importance, than in *National Labor Relations Board v. C & C Plywood,* No. 53 in which this court granted certiorari on April 18, 1966. In the circumstances review by this Court is clearly warranted and required.

Section 10(a) of the National Labor Relations Act states that the "Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce" (29 U.S.C. § 160(a)). The term "commerce" and the term "affecting commerce" are defined in Section 2(6) and (7) of the Act, 29 U.S.C. § 152(6) and (7). (Appendix D, infra, p. 42) It is recognized that the Board in its discretion may by decision or published rules decline to assert jurisdiction over any labor dispute, "where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction" (Sec. 14(c)(1), 29 U.S.C. § 164(c)(1)).

While the Board has discretion in the area of jurisdiction, it is not unlimited. This and other courts have set aside the Board's exercise of jurisdictional discretion that are arbitrary, unreasonable, discriminatory or capricious. *Office Employees Int. Union v. National Lab. Rel. Bd.,* 77

S. Ct. 799; *Hotel Employees Local No. 255 v. Leedom*, 79 S. Ct. 150. In one of the early decisions pertaining to the Act, this court in *Labor Board v. Jones & Laughlin*, 57 S. Ct. 615, dealing with the term "affecting commerce", said:

> "This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce, and thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. . . We are thus to inquire whether in the instant case the constitutional boundary has been passed."

Moreover, the *Administrative Procedure Act* (5 U.S.C. § 1009(e)) provides that the reviewing court shall "set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Since 1950, the Board as matter of policy has consistently declined to exercise jurisdiction over racetracks. *Los Angeles Turf Club, Inc.* 90 N.L.R.B. 20 (1950); *Hialeah Race Course, Inc.*, 125 N.L.R.B. 388 (1959); *Jefferson Downs, Inc.*, 125 N.L.R.B. 386 (1959); *Pinkerton National Detective Agency, Inc.*, 114 N.L.R.B. 1363 (1955).

The Board has not only declined jurisdiction over racetracks but has extended its declination to breeders of race horses. *Meadow Stud, Inc.*, 130 N.L.R.B. 1202 (1959) and *Walter A. Kelley*, 139 N.L.R.B. 744 (1962). Of particular importance here, the Board has recently even declined jurisdiction over food concessionaires at racetracks. *Hotel & Restaurant Employees Union (Resort Concessions, Inc.)*,

148 N.L.R.B. 208 (1964). The Board expounded its rationale in *Hialeah Race Course, Inc., supra,* as follows (125 N.L.R.B at 390-391):

> ". . . it is our opinion that the effect on commerce of such labor disputes is not sufficiently substantial to warrant the exercise of the Board's jurisdiction. In the first place, in *Los Angeles Turf Club,* the Board had occasion to consider racetrack operations of comparable size and character to the ones involved herein, and found that such operations, although not wholly unrelated to commerce, were essentially local in character. . . . In the second place, Board declination of jurisdiction will not leave the labor relations of such operations unregulated. Congress, in addition to establishing the Board's discretionary authority to decline jurisdiction, specifically provided for State assumption of jurisdiction in such situations. Given the character of racetrack operations, which are permitted to operate by reason of special State dispensation, and are subject to detailed regulation by the States, we can assume that the States involved will be quick to assert their authority to effectuate such regulation as is consonant with their basic policy. In these circumstances, we anticipate little interference or obstruction with commerce resulting from labor disputes in the racetrack industry as a result of our decision to decline to assert jurisdiction over such operations."

Recently the Board has emphasized its second line of reasoning—the existence of extensive state regulation and the likelihood that the states will not tolerate drawn out labor disputes in this field because of the important revenue derived from racing activities. In *Walter A. Kelley, supra,* 139 N.L.R.B. at 747, the Board said:

> "Because of the important revenue derived from racing activities, State governments have a strong interest

> in insuring uninterrupted operations at racetracks. . . . We believe that, because of the unique nature of the racing industry, the regulation of labor matters governing employees should be left to the States, which under Section 14(c)(2) are in a position to assume jurisdiction if the Board declines to do so. The Board's limited resources can be better devoted to industries and operations where labor disputes are likely to have a more substantial impact on commerce than disputes in the racing industry."

Horse racing is conducted in twenty-eight states.[3] Betting takes place just as it does in gaming. Horse racing involves constant movement across state lines of horses, equipment, trucks, airplanes, racing paraphernalia, money, jockeys, trainers, apprentices, owners, employees, judging officials and of those who desire to improve the breed by their wagers. Racing results, selections, and other horse racing information are transmitted and reported by the press, wire services and other means throughout the United States. There are even publications devoted exclusively to horse racing, e.g., the Daily Racing Form. There is an intimate relation of racing to allied industries such as, totalizators and racing publications. *Los Angeles Turf Club, Inc.*, 90 N.L.R.B. 20.

The Court of Appeals borrowing from the Board's brief, stated that "the Board points out that gaming is the major industry of [Nevada] and that it annually attracts more than twenty million tourists to Nevada, entailing vast use of interstate transportation facilities." (Appendix B, infra, p. 9) There is not a scintilla of evidence in

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3. *Statistical Reports on Horse Racing in the United States For The Year 1965* (The National Association of State Racing Commissioners, March, 1966) Table No. 1 (Hereafter cited "Statistical Reports").

the record to support any such conclusions. Assuming, *arguendo,* that gaming is the major industry of Nevada, then *a fortiori,* the Board's rationale in the racetrack cases is all the more reason for the Board to decline to assert jurisdiction over gaming confined to this one State. Indeed, it is highly questionable whether under the Congressional declaration of policy and the definitions of "commerce" and "affecting commerce", the Board has statutory jurisdiction (Sec. 1(b), Sec. 101, Sec. 2(6), Sec. 2(7).) Petitioner's operations are purely local in character; they are legal only in Nevada. Moreover, if as the Board has found, horse racing is local in character, gaming in Nevada is at least so if not more so.

In its *raison d'etre,* the Board lays stress, among other things, on tourists in Nevada as being attracted by gaming. The court below borrowed this thought also, even though the record is barren of any evidence to support such a conclusion. Yet, neither the court of appeals nor the Board mention nor gave consideration to the fact that far more people are attracted to and attend races than do casinos in Nevada. Horse racing attendance was 62,887,478 in 1965. (*Statistical Reports,* note 2, *supra*) The opinion of the court below refers to 20,000,000 Nevada tourists (Appendix B, infra p. 9). Both the court of appeals and the Board are silent on whether all of these Nevada tourists, or what proportion, attended casinos.

The court of appeals, again borrowing from the Board's brief, states that the tourists annually attracted to Nevada by gaming, entail vast use of interstate transportation facilities" (Appendix B, infra, p. 9). Here again there is no evidence in the record to support this. Nonetheless, in *Los Angeles Turf Club, Inc., supra,* and the decisions following it, the Board has continually regarded

such transportation as *incidental* to the "sporting events" and not altering their local character.

The basic and principal ground on which the Board premises its position, is that gaming is the major industry of Nevada, supplying that state with considerable tax revenue. Whether gaming is the major industry or only one important industry in Nevada's economy is not disclosed by the record. Be that as it may, it is hardly pertinent to the issue. Horse racing provides vastly greater tax revenue for the individual states in which it is carried on than does gaming in Nevada. Racing provides more than twenty-five times as much revenue to the various states.[4]

The board asserts that gaming is more important to the economy of Nevada than horse racing is to the economy of the states permitting racing. This hardly aids the Board since it emphasizes the purely local character of gaming which is legalized in only one state. In making this argument, the Board has switched and tortured its reasoning in the racetrack cases. The Board does not rest its decisions in those cases on the ground that racing was not important to the economy of the states involved. On the contrary, the Board stressed the importance of racing to the states, saying "(b)ecause of the important revenue derived from racing activities, state governments have a strong interest in insuring uninterrupted operations at racetracks. *Walter A. Kelley,* 139 N.L.R.B. at 747.

This "strong interest" of the state, of which the Board speaks, in not having labor disputes interrupt operations

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4. The Board stated tax revenue to Nevada from gaming was $13.7 million. Tax revenue from horse racing to all of the states in which it takes place was over $369 million in 1965. Five states had tax revenue from horse racing in excess of $14 million. California (neighbor of Nevada)—$47.5 million; Florida—$16.2 million; Illinois—$30.5 million; New Jersey— $28.8 million; and New York—$140.4 million. *Statistical Reports,* note 2, *supra*).

at racetracks is, in light of the Board's own argument, even stronger as to gaming in Nevada. For, if gaming is as important to Nevada's economy as the Board claims, then Nevada would have an even "stronger interest" in "insuring uninterrupted operations". Thus, the vice of the Board's position and its arbitrariness and capriciousness is that in the horse racing cases it declines jurisdiction because the state has a "strong interest" and it asserts jurisdiction over gaming for the very same reason.

The Board referred to extensive regulation of horse racing by the states involved as another reason for declining jurisdiction. Yet, gaming is regulated more extensively in Nevada than is horse racing elsewhere. The Board admitted in the court of appeals that gaming is extensively regulated by Nevada. Such regulation includes detailed provisions governing licensing of gaming operations, far-reaching supervision of the entire industry, including regulations pertaining to personnel. The Board has here, where there is present the identical reasons on which it based its declination of jurisdiction over horse racing, ignored those reasons and, this, on wholly frivolous and untenable arguments. It has thereby lent confusion to the entire issue of the Board's jurisdiction. So has the court of appeals. In an earlier case, the court below referred to the necessity of showing prejudice will result by virtue of the Board's assertion of jurisdiction. *N.L.R.B. v. Gene Compton Corp.*, 262 F.2d 653. In its opinion in the instant case, the court speaks of the need to establish "substantial[ly] prejudice will result" (Appendix B, infra, p. 10). Presumably the court below was satisfied there was prejudice to petitioner but that it was not "substantial". This requirement of showing substantial prejudice was a new dimension added by the court of appeals in this case. Since the court of appeals has not

given us the quantum or quality of proof required to show that petitioner is "substantially prejudiced", petitioner, counsel, and others in similar situations are left completely in the dark as to what the court of appeals means by its use of that phrase. In the petition for rehearing, the court below was also asked to elucidate and to remand the case back to the Board to permit evidence to be presented to show substantial prejudice. The petition was denied in toto.

As mentioned, the Board has extended its policy in the racetrack cases to breeders of racehorses, *Meadow Stud, Inc.*, 130 N.L.R.B. 1202; *Walter A. Kelley*, 139 N.L.R.B. 744,[5] and to food concessionaires at racetracks, *Hotel & Restaurant Employees Union (Resort Concessions, Inc.)* 148 N.L.R.B. 208, and to a private detective agency which furnished patrolmen and ushers to racetracks, *Pinkerton National Detective Agency*, 114 N.L.R.B. 1363. The Board has also declined to assert jurisdiction over an indoor sports arena, *Olympia Stadium Corp.*, 85 N.L.R.B. 389. In two cases the Board stated it would assert jurisdiction because it noted that there was an absence of detailed regulation by other public authorities as contrasted with the racetrack cases. *League of New York Theatres, Inc.*, 129 N.L.R.B. 1429, and *Ray, Davidson & Ray*, 131 N.L.R.B. 433.

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5. Race horse breeding is a syndicated business running into billions of dollars. *Fortune Magazine*, Jan. 1966, page 159.

Petitioner in its petition in the court below for rehearing or in the alternative for remand to the Board, offered to present newly discovered evidence in the form of an extensive study by Stanford Research Institute showing that horse racing is in competition with gaming in Nevada *(California's Horse Racing Industries—An Economic Analysis)* and that the Board's assertion of jurisdiction prejudices petitioner and the gaming industry by adding an additional regulatory burden and a considerable cost factor to the operations of gaming while horse racing is free from such burden and cost.

To add to the confusion, the court below in its opinion in *N.L.R.B. v. Gene Compton's Corporation, supra,* stated that the record there was "devoid of sufficient evidence to justify a finding that the Board has refused to take jurisdiction of other businesses of a nature indistinguishable on relevant grounds from respondents." Here, as we have shown, the Board has refused to take jurisdiction over racetracks. Clearly, racetracks are businesses "of a nature indistinguishable on relevant grounds" from casino operations. The life of both businesses depends upon betting. Without betting neither would exist and neither would be a source of tax revenue to the states.

In its summing up of the jurisdictional issue, the Board emphasizes the importance of gaming to Nevada. From this the Board maintains that a labor dispute could disrupt commerce substantially. There is no explanation by the Board as to how a dispute at a single casino in one state could disrupt commerce any more than at a racetrack. The Board does not support its conclusion with a single fact. It does not do so because it cannot. It must be apparent to any objective observer that a labor dispute in a single casino out of the many in Nevada would be far less disruptive than a labor dispute at what might be the only large racetrack in a given state.

As was said in *Farrell v. County of Placer,* 23 Cal. 2d 624 (1944), at 628:

> "It has been aptly said: 'If we say with Mr. Justice Holmes, "Men must turn square corners when they deal with the Government," it is hard to see why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens.' (48 Harv. L. Rev. 1299)."

It is hardly rectangular rectitude to treat persons differently by distinctions without a difference. It is well

settled that guarantees of due process of law and the equal protection of the laws have the same meaning. The Board's case, however, rests on such distinctions.

The Board's treatment of gaming as compared with its treatment of racetracks and business activities associated therewith, amounts to class legislation and is arbitrary, unreasonable, discriminatory and capricious. It constitutes a violation of the due process clause of the Fifth Amendment of the Federal Constitution. This court has said that arbitrary discrimination between persons in similar circumstances is a denial of due process of law, and that the exercise of the commerce power is subject to the Fifth Amendment. *Currin v. Wallace,* 59 S. Ct. 379.

2. In *Universal Camera Corp. v. National Labor Rel. Bd.,* 71 S. Ct. 456, it was held that with the advent of the Taft-Hartley Act and Administrative Procedure Act, "Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof." The mandate of that decision requires the court of appeals in looking for substantiability of evidence, to take into account whatever in the record fairly detracts from its weight and this means that the courts must "consider the whole record." Mr. Justice Frankfurter in writing the court's opinion, ably expressed the view that "a formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application." He went on to state that "some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry." He reminded that "judges are not automata" and that the "ultimate reliance for the

fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work." Referring to the legislative history of the Taft-Hartley Act and the Administrative Procedure Act, he said it "demonstrates a purpose to impose on courts a responsibility which has not always been recognized."

Here, the court of appeals, obviously did not perform the obligation laid upon it. A reading of the opinion of the court below demonstrates that it borrowed copiously from the Board's brief and from the trial examiner's decision. The Board's brief, like its decision, was based on a careful selection of parts of the evidence which, in its view, supported its theory. Had the court below assumed its responsibility for the "reasonableness and fairness of Labor Board decisions," it would upon reviewing the record as a whole perforce had to conclude that there was no substantial evidence when viewed on the record as a whole to support the Board's finding that Wetherill was discriminatorily terminated. The Board reached its conclusion on the unsupported finding that Wetherill was not junior in the entertainment department. It did this by ignoring petitioner's organizational structure and the established fact that seniority was by department and not company-wise.

Wetherill's employment with petitioner began in the sound department as a sound console operator. The console was physically located in the South Shore Room in which the stage was located but at opposite ends (Tr. 332). His supervisor was the sound engineer (Tr. 935-937). The sound department was under the supervision of the manager of construction and maintenance (R.X. 4, 13; Tr. 329-331, 519-521). He left his job on the console because of illness. After recovering, he did not want to return to

the console because he found that job too nerve wracking. He inquired as to whether there was an opening on the stage crew in the entertainment department. There was one and he was given it. The opinion of the court of appeals states he "was transferred at his request to the job of stage hand" (Appendix B, infra, p. 11). This is what the Board's brief states, but it is not what the record shows. The evidence was that he was not transferred but was hired in as a new employee. The evidence further showed that when leaving one department and going to work in another, seniority does not carry over from department to department. Supervision was totally different in the two departments. The entertainment department operated under a vice-president separately from the sound department which operated under a manager of construction and maintenance The sound console operator was never classified as part of the entertainment department (Tr. 333, 578, 591, 704, 780). Although documentary and other evidence was introduced showing petitioner's organizational setup and definite demarcation of departments, the Board ignored this and adopted the Trial Examiner's conclusion that petitioner did not maintain a rigid separation of departments and that the functions of the sound console operator were more directly related to those of the stage crew than those of the sound department. The court below went along with this. (Appendix B, infra, p. 14, R. 44) Without such conclusion, the Board's case must fall. If Wetherill's service with petitioner as a sound console operator and as a member of the stage crew, which all together was less than a year, could not be lumped together he was, even admittedly by the Board, the junior member of the stage crew. To accomplish this was crucial to the Board's theory of discrimination. The Board's anxiety about this is made even more evident by the fact that while reaching its conclusion Wetherill

was not low man, it does not tell us who, in its judgment, was. In fact, the Trial Examiner, whose findings the Board adopted, did not even find that Wetherill was not the low man. The most he would say was that "a tenable basis exists for concluding the job of sound console operator was actually in the Entertainment Department, and, since Respondent contends that it applied departmental seniority in making its decision, Wetherill should not have been discharged" (Appendix C, infra, p. 32, R. 45). This can hardly be said to be a finding, let alone a finding based on evidence.

It seems rather apparent that the court below here abdicated its reviewing obligation with respect to Board decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN R. BERKE
433 California Street
San Francisco, California 94104
Attorney for Petitioner

Of Counsel:

SEVERSON, WERSON, BERKE & LARSON
433 California Street
San Francisco, California 94104

December 16, 1966

(Appendices Follow)

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

No. 20270

National Labor Relations Board,
Petitioner,

vs.

Harrah's Club,
Respondent.

Filed—Aug 5 1966
Wm. B. Luck, Clerk

ORDER

Before: Chambers, Circuit Judge, Madden, Judge of the Court of Claims, and Hamley, Circuit Judge

The petition for rehearing and the suggestion of rehearing en banc are denied.

/s/ RICHARD P. CHAMBERS
United States Circuit Judge

/s/ J. WARREN MADDEN
Judge of the Court of Claims

/s/ FREDERICK G. HAMLEY
United States Circuit Judge

Appendix B

In the United States Court of Appeals for the Ninth Circuit

No. 20270

National Labor Relations Board,
Petitioner,

vs.

Harrah's Club,
Respondent.

Filed—Jul 11 1966
Wm. B. Luck, Clerk

DECREE

Before: Chambers, Circuit Judge, Madden, Judge of the Court of Claims, and Hamley, Circuit Judge

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent Harrah's Club, its officers, agents, successors, and assigns, on February 12, 1965. The Court heard argument of respective counsel on May 10, 1966, and has considered the briefs and transcript of record filed in this cause. On June 14, 1966, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed by the United States Court of Appeals for the Ninth Circuit that Harrah's Club, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees with regard to their union activities, membership, and sympathies; threatening employees with reprisals because of such membership, activities, and sympathies; soliciting employees to circumvent the Union as their collective bargaining representative and

deal instead directly with management; threatening employees with loss of fringe benefits in reprisal for union activities; or otherwise interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

(b) Discouraging membership in a labor organization by discharging, refusing to reinstate, or in any other manner discriminating against any of its employees in regard to their hire or tenure of employment or any term or condition of employment.

(c) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Offer to Robert H. Wetherill, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, as set forth in the section of the Decision of the Trial Examiner of the National Labor Relations Board, entitled "The remedy."

(b) Notify the above-named employee, if presently serving in the Armed Forces of the United States of America,

of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and all other rights under the terms of this Decree.

(d) Post at its Club, Stateline, Nevada, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, (San Francisco, California) shall, after being duly signed by the Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to such employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within 10 days from the date of this Decree what steps Respondent has taken to comply herewith.

/s/ Wm. B. Luck,
Wm. B. Luck
Clerk

[Seal]

A True Copy
Attest: Aug 20 1966
Wm. B. Luck
Clerk
by .....

.....

Appendix

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not interrogate our employees regarding their union membership, activities and sympathies; threaten them with reprisals because of such membership, activities and sympathies; solicit our employes to circumvent the Union as their collective bargaining representative, and deal instead directly with management; threaten employees with loss of fringe benefits in reprisal for the union membership, activity, or sympathies; or, otherwise, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed under Section 7 of the Act.

We Will Not discourage membership in any labor organization by discharging, refusing to reinstate, or in any other manner discriminating against any of our employees in regard to their hire or tenure of employment, or any term or condition of employment.

We Will Offer to Robert H. Wetherill immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination by us against him.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist said Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining, or other mutual aid or

protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement in conformity with Section 8(a)(3) of the National Labor Relations Act, as amended.

HARRAH'S CLUB
(Employer)

By
(Representative) (Title)

Dated

[Seal]

Note: We will notify the above-named employee, if presently serving in the Armed Forces of the United States of America, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 450 Golden Gate Avenue, Room 13050, San Francisco, California, 94102, (Telephone: 556-3197), if they have any question concerning this notice or compliance with its provisions.

In the United States Court of Appeals
for the Ninth Circuit

No. 20270

National Labor Relations Board,
Petitioner,

vs.

Harrah's Club,
Respondent.

[June 14, 1966]

On Petition for Enforcement of an Order of the National Labor Relations Board

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Before: Chambers, Circuit Judge, Madden, Judge of the Court of Claims, and Hamley, Circuit Judge

Hamley, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order requiring Harrah's Club to cease and desist certain unfair labor practices at the company's Lake Tahoe gambling casino in Stateline, Nevada. Respondent opposes enforcement on the ground that the Board's assertion of jurisdiction is arbitrary and an abuse of discretion, and on the further ground that the Board's findings that the company engaged in unfair labor practices are not supported by substantial evidence. The Nevada Resort Association has filed an amicus curiae brief in support of respondent's position on the jurisdictional issue.

On the jurisdictional question respondent and amicus curiae argue, in effect, that because the Board has consistently declined to exercise jurisdiction over racetracks for reasons which are equally applicable to the Nevada gambling industry, the failure of the Board likewise to exempt respondent from regulation is arbitrary and capricious.

The Board has consistently declined to exercise jurisdiction over racetracks.[1] It has done so pursuant to the authority vested in the Board under section 14(c)(1) of the National Labor Relations Act (Act), 73 Stat. 541 (1959) 29 U.S.C. § 164(c)(1) (1964).[2] The Board's rationale in exempting racetracks from regulation has been that: (a) racetrack operations are essentially local in character so that a labor dispute therein is not likely substantially to disrupt interstate commerce, and (b) racetracks are subject to detailed state regulation which, in the absence of Board regulation may, and probably will, be extended to include labor relations.[3]

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1. Chronologically: *Los Angeles Turf Club, Inc.* (1950) 90 N.L.R.B. 20; *Pinkerton's National Detective Agency, Inc.* (1955) 114 N.L.R.B. 1363; *Jefferson Downs, Inc.* (1959) 125 N.L.R.B. 386; *Hialeah Race Course, Inc.* (1959) 125 N.L.R.B. 388; *Meadow Stud, Inc.* (1961) 130 N.L.R.B. 1202; *Walter A. Kelley* (1962) 139 N.L.R.B. 744; *Hotel & Restaurant Employees Union (Resort Concession, Inc.)* (1964) 148 N.L.R.B. 208. The policy of the Board in declining jurisdiction as to racetracks, extends also to breeders and trainers of race horses *(Meadow Stud, Inc.* and *Walter A. Kelley, supra)*, and food concessionnaires at racetracks *(Hotel & Restaurant Employees Union, supra)*.

2. Section 14(c)(1) provides, in pertinent part:
"(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. . . ."

3. See *Hialeah Race Course, Inc., supra,* at 390-391.

The Board denies that (a) of the racetrack rationale, pertaining to the local character of the industry, is applicable to the gambling industry in Nevada. The Board points out that gambling is the major industry of that state and that it annually attracts more than twenty million tourists to Nevada, entailing vast use of interstate transportation facilities.

With regard to (b) of the racetrack rationale, concerning the likelihood of future state regulation of the industry's labor relations, the Board has not taken a clear-cut position. It does not deny that the Nevada gambling industry is subject to detailed state regulation or that, in the absence of Board regulation, Nevada state regulation may, and probably will, be extended to include labor relations. Instead, it takes a firm position with regard to two matters with which the (b) rationale is not concerned. The Board asserts that the fact that Nevada has enacted detailed regulations governing the gambling industry does not prevent the Board from asserting its jurisdiction, and points out that the Nevada Gaming Act does not now govern employer-employee relationships.

The Board has statutory jurisdiction to regulate the labor relations of Harrah's Club.[4] This being true, the exercise of that jurisdiction is subject to review only on the question of whether, under the circumstances, unjust discrimination will result. See *N.L.R.B. v. W. B. Jones Lumber Co.*, 9 Cir., 245 F.2d 388, 391; followed in *N.L.R.B. v. Local Joint Executive Bd. of Hotel and Restaurant Employees and Bartenders Union*, 9 Cir., 301 F.2d 149, 153. See, also, *N.L.R.B. v. Gene Compton's Corp.*, 9 Cir., 262 F.2d 653, 656; *N.L.R.B. v. Carpenters Local No. 2133*, 9 Cir., 356 F.2d 464, 465.

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4. Under section 10(a) of the Act, 61 Stat. 146 (1947), 29 U.S.C. § 160(a), (1964), the Board is empowered "... . to prevent any person from engaging in any unfair labor practice . . . . affecting [interstate] commerce."

Assuming that the criteria applied by the Board in determining to exempt racetracks from regulation are equally applicable to gambling casinos in Nevada, this alone is not sufficient to establish that regulation of the gambling industry will result in unjust discrimination. It must also be shown that the gambling industry will be substantially prejudiced by Board regulation because racetracks are not similarly regulated. See *N.L.R.B. v. Gene Compton's Corp., supra.*

There is here no contention that the gambling industry will be so prejudiced, and there is nothing in the record to support a finding or conclusion that such prejudice will result. We therefore conclude that the Board did not act arbitrarily and did not abuse its discretion in exerting regulatory jurisdiction over respondent.

The Board found that Harrah's Club violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1964) by coercively interrogating its employees regarding their union activities, threatening them with reprisals because of such activities, and soliciting them to abandon the union as their collective bargaining representative and deal directly with management.[5] Respondent argues that these findings are not supported by substantial evidence.

Viewing the record as a whole, we conclude that these findings are supported by substantial evidence.

The Board also found that Harrah's Club violated section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1) (1964), by discharging employee Robert H. Wetherill because of his union activities. Respondent contends that this finding is not supported by substantial evidence.

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5. The labor union involved was the International Alliance of Theatrical Stage Employees and Motion Picture Operators of the United States and Canada, Local 363, AFL-CIO (Local or Union).

As indicated by the section 8(a)(1) findings referred to above, the record is replete with evidence of respondent's hostility toward the union. Wetherill was a leading union figure. He was employed by Harrah's Club on August 30, 1962 as a sound console operator. He continued in that job at the South Shore Room of the Lake Tahoe casino until early May, 1963, when he left temporarily due to illness. On his return, on May 30, 1963, Wetherill was transferred at his request to the job of stagehand.

Early in June, 1963, Wetherill became the unsalaried business agent for the Local. About a week later he notified Robert I. Brigham, the company's director of industrial relations, of his position with the union. Several other supervisory employees learned of this soon afterward.[6] Wetherill began to organize the stagehands and, by August 9, had recruited a majority of these employees. On that date he sent Brigham a telegram requesting recognition. On August 14, Wetherill filed a representation petition.[7]

Several days after the filing of the petition and the posting of a copy on the premises, Lein and Vogt spoke to Wetherill in Lein's office. Lien asked Wetherill why he had not told Lein and Vogt about the petition. Wetherill said he did not trust Lein. Lein returned the compliment and Wetherill left. About this same time Lein told Bruce T. Lovelady, a stage technician, how Lein and Vogt had

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6. Robert Vincent, director of entertainment; Arthur Barkow, producer; Sy Lein, stage manager; and Jacques A. Vogt, chief lighting technician.

7. On September 5, 1963, respondent entered into a Stipulation for Certification upon Consent Election. A tally of ballots cast in the election, on October 14, 1963, revealed that of twelve eligible voters, eleven cast ballots in favor of the union. On October 18, 1963, respondent filed objections to the election. On February 27, 1964, the Board dismissed the objections and certified the union as exclusive bargaining representative of the employees in the unit found appropriate.

been "put in hot water" with management because they did not know in advance about the filing of the petition. Lein also told Lovelady that "as far as management was concerned they wouldn't trust Bob Wetherill any more." Asked why, Lein said it was because of Wetherill's filing of the petition "after all we had done for him," remarking that Wetherill "had stabbed them in the back."

Wetherill's employment was terminated on September 1, 1963. The reason stated on the termination slip was that Wetherill's discharge was necessary in order to make room for Charles H. Walker, a returning veteran. Seniority at Harrah's Club is determined by departments. Walker had been a member of the entertainment department before he had gone into the armed services. His seniority over Wetherill in that department is conceded and it is not disputed that he had a right to return to his job.

Respondent took the position that Walker's return made it necessary to let Wetherill go because the company was not justified in absorbing an additional employee in the entertainment department, and Wetherill was the junior man. Both of these reasons were made the subject of extensive and largely conflicting testimony, the Board's general counsel taking the position that neither reason was valid.

With regard to the company's desire to avoid any increase in the staff of the entertainment department, Vincent steadfastly maintained that the stage crew had been overstaffed. However, he took no steps to reduce the size of the crew prior to the advent of the union. Early in August, 1963, in a discussion about the possible effect upon the stagehands of the new Wage-Hour Law, Barkow told Lovelady that it appeared that the company was faced with the alternative of

scheduling a seven-hour day, six-day work week, or hiring three additional stagehands, to avoid payment of overtime.[8]

With regard to the company's assertion that Wetherill was the junior member of the entertainment department, the question came down to whether, in that department, he had seniority over Paul Jordan or Ray McNerthney. The answer to this question required exploration of several collateral issues, as to each of which the evidence was in dispute.

One of these issues was whether Wetherill was attached to the entertainment staff which he was initially employed as a sound console operator on August 30, 1962, or when he became a stagehand on May 31, 1963. If the earlier date applies, Wetherill had seniority in that department over Jordan, and also over McNerthney if the latter was ever attached to that department.

The general counsel produced evidence tending to show that the sound console operator is considered a member of the entertainment department. This evidence included the testimony of Wetherill to that effect, and a series of time slips signed by Wetherill while he was a sound console operator. The slips list the department as "Stage," which is concededly in the entertainment department. All but one of these slips were signed by Lein, the stage manager in the entertainment department.

Respondent sought to explain these time slips by attributing the "Stage" notation, and the fact that the slips were signed by a supervisor in the entertainment department, to "widespread laxity" prevailing throughout the Club in the signing of such slips. Respondent also adduced addi-

8. Barkow also volunteered that Lein and Vogt had been urging him to hire additional men because, as things were, Vogt had been obliged to do relief work at the spotlight and light board, and Lein had been complaining that he had been unable to give his men vacations and time off. The employment of two additional men, Lein said, would relieve that problem.

tional evidence tending to support its position, including organizational charts and tables showing the entertainment department as separate from the sound department.

The Examiner found that in the actual operation of the South Shore Room, respondent did not maintain such a rigid separation between the departments. The Examiner also found that the functions of the sound console operator who worked in the South Shore Room in connection with the production of shows were more directly related to those of the stage crew than those of the sound department.

The evidence is also in conflict as to whether McNerthney was ever a member of the entertainment department. It seems to be established, however, that McNerthney replaced Wetherill part-time as a sound console operator in May, 1963, and that in July, 1963, upon the direction of supervisory personnel, he began to sign his time slips as an employee of the entertainment department.[9] If McNerthney became a member of the entertainment department on either of these dates he was junior to Wetherill in that department basing the latter's seniority, as the Examiner did, on the August 30, 1962 date.

The evidence is extensive and in detail on the issue of seniority and other motivations respondent may have had in terminating Wetherill. This is likewise true of the Examiner's findings, which exhibit careful consideration and evaluation of conflicting claims and evidence. Considering the record as a whole we conclude that the Examiner's ultimate finding, adopted by the Board, that respondent discharged Wetherill because of his union activities, is supported by substantial evidence.

The petition will be enforced.

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9. Respondent had originally selected McNerthney as the one to be terminated to make room for Walker. Early in August, 1963, Producer Barkow informed McNerthney that he was to be replaced by a returning veteran, and advised him to start looking for a job.

Appendix C

150 NLRB No. 169
D-6754
Reno, Nev.

United States of America
Before the National Labor Relations Board

Case No. 20-CA-2839

Harrah's Club
and
International Alliance of
Theatrical Stage Employees
and Motion Picture Operators
of the United States and Canada,
Local 363, AFL-CIO

DECISION AND ORDER

On October 16, 1964, Trial Examiner Irving Rogosin issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Decision attached hereto. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the excep-

tions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order, the Order recommended by the Trial Examiner, and orders that the Respondent, Harrah's Club, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. Feb 12 1965

John H. Fanning, *Member*
Gerald A. Brown, *Member*
Howard Jenkins, Jr., *Member*
NATIONAL LABOR RELATIONS BOARD

(Seal)

United States of America
Before the National Labor Relations Board

Division of Trial Examiners
Branch Office
San Francisco, California

Case No. 20-CA-2839

Harrah's Club
and
International Alliance of
Theatrical Stage Employees
and Motion Picture Operators
of the United States and Canada,
Local 363, AFL-CIO

DECISION OF TRIAL EXAMINER*

Statement of the Case

This proceeding under the National Labor Relations Act, as amended (29 U.S.C. Sec. 151 *et seq.*, 61 Stat. 136), herein called the Act, is based upon a complaint issued November 21, 1963, alleging that Harrah's Club, Respondent, herein sometimes also called the Club, or the Employer, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Specifically, the complaint alleges that on various dates between on or about August 9, 1963, and on or about October 20, 1963, Respondent, through various named supervisors, (1) coercively interrogated employees regarding their union membership activities and sympathies; threat-

*The decision is not reproduced in its entirety; only that part which is pertinent hereto.

ened them with reprisals therefor; and solicited them to bypass their bargaining representative and deal directly with management, thereby interfering with, restraining, and coercing employees in violation of Section 8(a)(1); and (2) on or about September 1, 1963, discharged Robert H. Wetherill because of his union or other protected activities, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3), and interfering with, restraining and coercing employees in the exercise of the rights guaranteed by Section 7, in violation of Section 8(a)(1) of the Act. Respondent's answer substantially admits the jurisdictional allegations of the complaint, and the status of named persons, with the exception of Herbert Swartz, as supervisors within the meaning of the Act, and denies generally the commission of any unfair labor practices.

Upon the entire record in the case, including his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business of Respondent

Harrah's Club, a Nevada corporation, with its principal office and place of business in Reno, Nevada, is, and at all times mentioned herein has been, engaged in the business of owning and operating restaurants and gambling casinos in Reno and Stateline, Nevada. During the past year, Respondent in the course of its business operations purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of Nevada. During the same period, Respondent sold goods, merchandise and services valued in excess of $500,000.

* * *

III. The unfair labor practices

A. *Interference, restraint and coercion*

1. Chronology of events

a. *Introduction*

The business of Respondent consists of the operation of gambling casinos and restaurants, known as Harrah's Reno, Harrah's Bingo, Harrah's Casino and Restaurant, located in Reno, Nevada, and Harrah's Lake Tahoe and Harrah's Tahoe, located at Lake Tahoe, in Stateline, Nevada. Harrah's Tahoe is the largest of these operations, and contains the South Shore Room, a theatre-restaurant accommodating upwards of 700 guests and featuring many of the outstanding performers in the entertainment industry. Also located in this casino is the Stateline Lounge, which features continuous entertainment around the clock. This proceeding concerns the stage technicians who provide the technical services for stage productions in the South Shore Room.

There is no dispute as to the supervisory status of management personnel, excepting Herbert Swartz, responsible for the production of the shows, at the times mentioned in the complaint. They are:

Robert I. Brigham, Director of Industrial Relations
Robert (Bob) Vincent, Director of Entertainment
Arthur Barkow, Producer
Sy Lein, Stage Manager
Jacques A. Vogt, Chief Lighting Technician
Joseph L. Sheeketski, Shift Manager[3]

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3. Also mentioned in the complaint as a supervisor is William Ross, who is alleged to have engaged in interrogation of employees. During the hearing, the allegations of the complaint with respect to this alleged supervisor were amended to substitute the name of Ian Griggs as the supervisor alleged to have engaged in these activities. Upon motion of the General Counsel, these allegations insofar as they related to Ian Griggs were stricken from the complaint.

Among other management representatives who figured prominently in the events which occurred, or who have been mentioned in the course of the proceedings, were Rome Andreotti, vice-president of administration, and Kenneth E. Clever, assistant manager in charge of operations and personnel. The status of Swartz, head of the sound department during the early stages of the events described hereinafter, will be considered in connection with the alleged discriminatory treatment of Wetherill.

B. *Discrimination in regard to hire and tenure of employment of Robert H. Wetherill*

Robert H. Wetherill was employed by Respondent on August 30, 1962. Hired as sound console operator, by Herbert Swartz, sound technician in charge of the sound equipment at the Club, Wetherill continued in that job at the South Shore Room until early in May 1963, when he left due to illness. On his return, about May 30, he was transferred at his request to the job of stagehand. His wages as sound console operator had been $25 a day, in contrast to $24 a day for stagehands. When he brought this to Brigham's attention shortly afterwards, his pay was adjusted to $25. For the first week of his employment as a stagehand, he worked on the AC lighting board, under the supervision of Lighting Director Vogt. A week or 10 days later, at Wetherill's request, Vogt relieved him of that assignment, and Wetherill was then assigned to the "deck" or stage.

Early in June 1963, Wetherill became unsalaried business agent for the Local. About a week later, he notified Director of Industrial Relations Brigham of his position with the Union. Vincent, Barkow, Lein and Vogt learned of this soon afterward. When asked by Vogt about his future plans, Wetherill told him that he had none as yet.

Wetherill began to organize the stagehands, and by August 9 had recruited a majority of those employees. On that date, he sent Brigham the telegram requesting recognition. On August 14, Wetherill filed the representation petition. The events which followed have already been described.

On August 30, Entertainment Director Vincent instructed Barkow to have Wetherill notified that he was to be terminated September 1. In the absence of Stage Manager Lein, Barkow told Lovelady, (who, as has already been mentioned, occasionally substituted for Lein), that Wetherill was to be terminated during the second show the following night. Barkow told Lovelady to have Wetherill report to Barkow at that time, and asked Lovelady to keep the matter confidential. Lovelady asked Barkow the reason for the termination, and Barkow said that it was to make room for a returning veteran.

When Wetherill reported to Barkow as directed, Barkow began by saying that he was at a loss to understand what Wetherill had against him, unless it was the temporary reduction in his daily rate following his transfer from the job of console operator to that of stagehand. Barkow then told Wetherill that he was being terminated as of the end of the show that night. Wetherill asked whether he was being selected as "the first to go" because he was "the youngest man," and inquired, "What about Paul Jordan?" Barkow replied, according to Wetherill, "Oh, he is just an apprentice." Wetherill asked whether he was being terminated because of the Union. Barkow said that he was not, and showed Wetherill his termination slip, which gave as the reason for termination the return of an employee from the armed forces. Wetherill was thereupon terminated,

effective September 1, and, after a delay of several days, received his final paycheck.

A meeting of the Board of Review was originally scheduled for September 13, 1963, to consider Wetherill's protest against his discharge.[40] Due to an apparent lack of communication between the parties, Wetherill, who was attending a representation election at another gambling casino, in the outlying area, did not appear. Some of the discussion at this abortive meeting of the Board of Review has been previously detailed.

During this episode, Brigham, after examining Wetherill's personnel jacket, inquired whether the other members of the Board were aware that Wetherill had been convicted of a crime.[41] Clever said that he was not, and wondered aloud how Wetherill came to be hired under those unusual circum-

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40. The Board of Review, as described in the employees' handbook and the testimony of Respondent's witnesses, consists of three voting members, namely, the Club Manager, the Director of Industrial Relations, or their representatives, and an employee representative elected by the fellow-employees in his department. Although, according to the handbook, the Board is empowered to deal with "all types of problems," its primary function is to handle grievances not satisfactorily resolved by the supervisor, or by resort to the "gripe" box. Under the applicable section, the decision of the Board of Review is final.

41. Wetherill had been convicted, after a plea of guilty, of violation of Federal statutes prohibiting the sending of obscene material through the mail. This evidence was adduced on Wetherill's direct testimony, Wetherill admitting that he had received a suspended sentence of one year, on each of two counts, and been placed on probation. No record of conviction was offered by Respondent, presumably because of his admission. In view of the circumstances under which the evidence was introduced, it is not altogether clear whether Respondent was relying on this conviction as ground for impeachment. On the assumption that Respondent so intended, the undersigned has carefully considered the evidence of this conviction in passing upon Wetherill's credibility. However, in view of the substantial corroboration by other witnesses, whose testimony has been credited, of Wetherill's testimony on many of the salient facts, the undersigned finds that his credibility has not been adversely affected by the evidence of his conviction.

stances. Further examination of Wetherill's file revealed that Wetherill had been recommended by Herbert Swartz, the sound engineer who claimed to have known Wetherill for 20 years. Brigham further observed that Wetherill's previous employment had consisted of work as an "odd job man" in a hospital, and, previous to that, as a liquor store manager, earning half as much as stagehands at the Club. When Clever expressed surprise that Wetherill had been employed as a sound man, in view of his background, Brigham remarked that it had undoubtedly been due to Swartz' intervention. Rux, however, told them that he believed that Wetherill, as an IATSE member, has worked as a stagehand prior to his employment at the Club.

Two days later, on September 15, the Board of Review again convened. The same management representatives were present; Lovelady attended as employee representative.

The Board was in session for about 30 minutes before Wetherill was admitted. Clever read Wetherill's request for a hearing which stated the grounds for his grievance. Brigham then produced the personnel records of the stage crew, and, selecting Wetherill's jacket, examined his employment records. Brigham again called attention to Wetherill's record, and the fact that he had been hired by Swartz.

Clever asked Lovelady which members of the crew he considered had less seniority than Wetherill. Lovelady mentioned Paul Jordan and Ray McNerthney. Turning to their personnel records, Clever maintained that Jordan had become a member of the stage crew in November 1962, while Wetherill had not joined the crew until May 1963, and was, therefore, junior to Jordan. As to McNerthney, Clever contended that he had never been employed in the entertain-

ment department, but had been, and still was, in the sound department. Lovelady said that, as far as he was aware, there had been no sound department at the Club for months. Clever insisted that the sound department had never been abolished, even though the position of head sound engineer had been eliminated, Lovelady argued that since July 1963, on instructions from Stage Manager Lein, McNerthney had been making out his time slips showing him in the entertainment rather than the sound department. Clever left the room to verify this and, upon returning, announced that as far as their records were concerned McNerthney was still in the sound department, currently assigned to maintenance.

With respect to Jordan, after referring to his personnel records, Brigham stated that Jordan was still assigned to the food stores department, and was only on loan to the stage or entertainment department for the 10 months he had been working on the stage crew. Lovelady, therefore, maintained that Jordan was only a temporary employee, not permanently assigned to the stage, and that even if the date of his temporary assignment to the stage was earlier than Wetherill's, Jordan rather than Wetherill should have been terminated. At this juncture Wetherill was admitted to the meeting.

According to Wetherill, Brigham asked him why he had requested the meeting. He replied that he thought his termination was "unfair" because there were others on the stage crew who had less seniority than he. Brigham countered by asking him whether he thought they had been "unfair" when they hired him in spite of his criminal record, and paid him during his illness.

Clever asked Wetherill to state the basis for his grievance. Wetherill stated his position, substantially as Love-

lady had outlined it to the Board members. Clever countered with the same replies he had made to Lovelady, concluding with the statement that Wetherill had less seniority than any other member of the stage crew. Wetherill, contending that the job of sound console operator was part of the entertainment department, insisted that his seniority should date from August 30, 1962, when he was hired on that job, rather than May 31, 1963, when he joined the stage crew, thus giving him more seniority than Jordan or McNerthney. Clever asked Wetherill who had been his supervisor while he worked as sound console operator. Wetherill named Lein. Clever vehemently disputed this, emphasizing his disagreement with a vulgar epithet.

After extended argument, Wetherill was excused. Clever announced that he would be governed by the records, and decided that Wetherill was the last stagehand hired, and, therefore, properly terminated. Lovelady conceded that, while "on paper" management might be correct, as a practical matter, it had been wrong in terminating Wetherill. By a vote of 2 to 1, Clever and Brigham concurring, the Board sustained Wetherill's termination. Wetherill was then summoned and notified of the Board's decision, Brigham consoling him with the reminder that, since he had already filed charges with the Regional Office of the Board, he would have a further opportunity to present his case.

Under date of September 16, 1963, a notice announcing the decision of the Board of Review was posted on the bulletin boards at the Club.

Analysis of contentions concerning Wetherill's discharge; conclusions

As is already evident, Respondent contends that the sole reason for Wetherill's discharge was the necessity for

restoring Walker, the returning veteran, to his former job on the stage crew.[45] There is no issue regarding Walker's seniority or his right to the job. Since, in Respondent's view, Wetherill was the stagehand with least seniority, it decided to dismiss him to make a place for Walker. According to Respondent, this was its first experience in dealing with a returning veteran, and Brigham and Vincent conferred to decide how to comply with the law. After discussing the size of the stage crew, Brigham asked Vincent whether he could "absorb another man." Vincent replied that he was already over-staffed, and he was being criticized for maintaining a much larger stage crew than any comparable casino in Las Vegas. Vincent asked Brigham whether there was any other place for Walker but Brigham said that it would be preferable to reinstate Walker to the job he had held before his induction.

Although Wetherill did not become a stagehand until May 31, 1963,—after the "appraisals" of the individual members of the stage crew had been made,—Brigham and Vincent reviewed these appraisals and concluded that Wetherill would be the logical man to go. Brigham concurred in this decision.

If, as Respondent contends, Wetherill's seniority was based on the date of his assignment to the job of stage technician, May 31, 1963, then it would appear that he had less seniority than any of the other stage technicians. The General Counsel contends, however, that Wetherill's seniority should have commenced on August 30, 1962, when he was initially employed as a sound console operator under the supervision of Herbert Swartz. Based on this date

45. Although there was some suggestion that Wetherill's work performance may have left something to be desired, both Brigham and Respondent's counsel categorically stated that this was the sole reason for Wetherill's discharge.

of hire, the General Counsel contends that Wetherill had seniority over at least two employees, Jordan and McNerthney.

As to Jordan, the record discloses that he was first hired in September or October, 1960, as a waiter in the food service department. He continued in that job through May, 1961, when he left for the summer. Returning in about October of that year, he worked as a clerk in the food stores department until about May, 1962. While still employed in that department, he was given a training course, and, on November 27, 1962, became an apprentice stage technician, working on the production of THE FLOWER DRUM SONG as his first assignment. The first week of January, 1963, Stage Manager Lein instructed him to sign his time slips thereafter as stage technician in the Entertainment Department, although, as has been seen, the Personnel Department continued to show him as on loan from food stores. The General Counsel contends, therefore, that Jordan's seniority date should be January, 1963, when he was first recognized as a full-fledged stage technician, or, at the very earliest, on November 27, 1962. In either case, this would make Jordan junior to Wetherill, if August 30, 1962, the date of his initial hiring, were considered controlling for purposes of seniority. Respondent, however, contends that, even if the January, 1963 date is used to determine Jordan's seniority, he would have seniority over Wetherill, based on the May 31, 1963, date, when Wetherill became a stagehand.

There are, however, some remarkable circumstances in respect to the issue of Jordan's seniority. In July, 1963, soon after he learned of Walker's imminent return, Jordan went to Stage Manager Lein and told him that he felt "it would be better to solidify [his own] position before

Walker came back or [he] would be the logical one to be bumped." Lein promised to "attempt to make [him] a stage technician." The day after Wetherill's discharge, Lein told Jordan that he was "a lucky [s-o-b] because they ruled that Wetherill was the junior man as far as the seniority and [Jordan] was kept on."

As to McNerthney, Respondent contends that he was never an employee of the Entertainment Department, (which is under the overall supervision of the Vice President, in charge of public relations) but of the Sound Department, which is a separate department under the direct supervision of the Sound Engineer, (who is under the overall supervision of the Manager of Construction and Maintenance).

McNerthney was first hired by the sound engineer on May 14, 1962, and worked as sound maintenance man in the casino for about a week. At about that time, Herbert Swartz succeeded to the sound engineer's job, and McNerthney was assigned to the job of sound console operator in the South Shore Room, where he worked for about four months, seven days a week, until Wetherill was hired as sound console operator. McNerthney then returned to the job of sound maintenance man, working at that job until Wetherill became ill early in May, 1963. Swartz then operated the sound console, and McNerthney relieved Swartz on his days off, working three days a week on sound maintenance in the casino, and two days, in the South Shore Room. About mid-July, 1963, Austin Raymer, director of maintenance, complained that his department was being charged with McNerthney's entire salary, although he was only working for him three days, and for the South Shore Room, two days. Raymer discussed this with Vincent, Swartz, Barkow and McNerthney, and as a result, Swartz and Lein instructed McNerthney to

sign his time slips as an employee of the Entertainment Department, informing him that he would thereafter be assigned exclusively to the South Shore Room. Since then, McNerthney has been employed in that room, operating the sound console on Swartz' days off and on vacations, and the sound equipment the remainder of the time.[47]

With respect to the issue of seniority in general, and McNerthney's, in particular, the record also reveals a singular set of circumstances. Thus, early in August, 1963, Producer Barkow informed McNerthney that he was to be replaced by a returning veteran, and advised him to start looking for another job, while assuring him of at least a month's employment, and offering to help him obtain other employment, and promised to furnish him with a reference.

About a week later, Vogt told McNerthney that as a result of a meeting between Lein, Barkow, Vogt and Swartz, it had been decided, in view of his electrical background, to assign McNerthney to the lighting department under Vogt, to assist in maintaining the light equipment, and to act as a relief spotlight operator. Thus, instead of terminating McNerthney, Respondent's supervisors found a job for him elsewhere in the Club. At the same time, Vogt told him that Norman Julian, (who had worked at the Club for a week in June learning the sound console operation), would be coming to work in the sound department, to relieve Swartz on his days off, and to do some work in the lighting department.

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47. Although McNerthney claimed that he also performed "stage work," such as "opening the room," which included mopping the stage, setting the curtains, and adjusting the lights, he was instructed by Brigham and Vogt, in about mid-August, not to "touch anything else on the stage," and to confine his duties "strictly to sound equipment work."

In the latter part of August, McNerthney asked Vogt when Julian was coming to work. Vogt told him that management "would make no changes until the union situation was clarified."

On the basis of this evidence, the General Counsel maintains that McNerthney became a member of the Entertainment Department, in May, 1963, when he replaced Wetherill as sound console operator. Based on the assumption that Wetherill's seniority began August 30, 1962, when he was first hired as console operator, the General Counsel contends that Wetherill also had more seniority than McNerthney at the time of his discharge.[48]

Respondent, on the other hand, maintains that, since McNerthney never was in the Entertainment Department, but always was in the Sound Department, the question of his seniority is irrelevant because Respondent made its selection of the employee to be terminated on the basis of seniority among the stage crew.

To substantiate their contention that management actually regarded the sound console operator as part of the stage crew, the General Counsel and the Charging Party introduced time slips applying to this job signed by stagehand supervisors.[49]

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48. It may be noted that McNerthney voted for employee representative of the stage technicians on the Board of Review in an election held in October, 1963. He did not, however, vote in the representation election for bargaining agent.

49. According to Wetherill, after he had been working as console operator for about a month, the job was placed under the Entertainment Department, and Stage Manager Lein told him that he would thereafter sign his time slips. Ten slips, signed by Wetherill, dated November 7 to 12, and November 16 to 18, both inclusive, and December 14, 1962, were introduced in evidence. All list the department as "Stage," and the job classification as "Console Opr." Except for the slip, dated November 11, which is signed by Barkow, all are signed by Lein, as supervisor.

Respondent attempts to meet this evidence by pointing to evidence that, contrary to express instructions in the employees' handbook, requiring employees to follow specified procedures in signing time slips, as a prerequisite to obtaining their paychecks, widespread laxity prevailed throughout the Club in the signing of such slips by supervisors. Thus, according to Brigham, it was common practice during 1962 and 1963, for supervisors to sign time slips for employees who were not under their supervision. In numerous instances, non-supervisory employees signed time slips, ostensibly as supervisor, frequently actually signing the name of a supervisor.[50]

In further support of his position on the seniority issue, the General Counsel relies upon the fact that in the Stipulation for Consent Election, the sound console operator is included with the stage technicians in the description of the appropriate unit. This overlooks the fact that the

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50. Brigham testified that some 17,000 such slips are used weekly for the 4000 employees at the Club. According to him, these slips are not used for payroll purposes, although they establish the shift and number of hours worked, but for the sole purpose of furnishing President Harrah with a daily profit and loss statement. Brigham testified that, in accordance with Respondent's business practices, time slips for 1963, have been destroyed. However, Respondent introduced 26 time slips, all but two dated the latter part of January, 1964, the remaining two, September, 1963. The two in 1963 had been preserved, according to Brigham, in connection with objections to an election among Respondent's culinary workers. Some of these slips were signed by a secretary of a supervisor; others bore names of non-supervisory personnel. None of the slips covered stage employees, but, for the most part, such departments as customer relations, bar, premium booths, commissary, restaurant, etc. These slips can scarcely be regarded, as Brigham claimed, a randum sampling, and were of negligible probative value. They furnish scant support for Brigham's testimony that probably as many as 50 percent of the time slips were signed by persons other than supervisors of the particular employees, or by unauthorized personnel. Brigham admitted that normally the supervisor of the employee involved would be the person to sign his time slip, if he were available.

Stipulation was not entered into until Sepember 5, 1963, four days after the termination of Wetherill's employment. It would be manifestly improper to view this as a restrospective admission by the Employer that the sound console operator was a part of the stage crew. Moreover, it ignores the fact that the Employer specifically qualified the Stipulation by a provision that inclusion of the sound console operator in the appropriate unit, and his eligibility to vote in the election, would not be binding upon the Employer in any other proceeding. The undersigned has placed no reliance on the fact that the sound console operator is included in the description of the unit in reaching his conclusions.

Despite the evidence adduced by Respondent, including the organizational charts and tables purporting to establish the Entertainment Department, including the stage crew, as separate from the Sound Department, the record as a whole indicates that, in the actual operations of the South Shore Room, Respondent did not maintain such a rigid separation between the two departments as it contended at the hearing. The record supports a finding that the functions of the sound console operator who worked in the South Shore Room in connection with the production of the shows, were more directly related to those of the stage crew than those of the Sound Department. Thus, a tenable basis exists for concluding that the job of sound console operator was actually in the Entertainment Department, and since Respondent contends that it applied departmental seniority in making its selection, Wetherill should not have been discharged. It is significant that Respondent adduced no evidence that there had existed, prior to Wetherill's discharge, a policy of seniority, whether departmental or company-wide, in the event of a

reduction in force. The evidence establishes merely that Respondent claimed to have applied the principle of departmental seniority, and, by contending that Wetherill's previous services had been performed outside the department, justified his discharge.

It may be conceded that it is not within the province of the Board to decide whether, in discharging Wetherill, Respondent acted fairly, justly or reasonably; whether it used criteria such as seniority, departmental or otherwise; or whether it discharged him for just cause, or, indeed, for none at all. We are concerned only with whether in discharging the employee, Respondent was motivated by discriminatory reasons proscribed by the Act. And, in making this determination, it must be borne in mind that existence of a valid cause for discharge, is no defense where the employer's actual motive is to discourage union membership. As the Court has said:

> We observe preliminarily that where, as here, contradictory reasons for the discharge of an employee are advanced, it is the responsibility of the Board to weigh the evidence and resolve the factual conflict. N.L.R.B. v. WTVJ, Inc., 268 F. 2d 346 (5th Cir. 1959); N.L.R.B. v. West Point Mfg. Co., 245 F. 2d 783, 786 (5th Cir. 1957); N.L.R.B. v. Wagner Iron Works, 220 F. 2d 126, 135 (7th Cir. 1955); cert. den. 350 U.S. 981; N.L.R.B. v. Whitin Machine Works, 204 F. 2d 883, 885, (1st Cir. 1953); N.L.R.B. v. Electric City Dyeing Co., 178 F. 2d. 980, 982 (3rd Cir. 1950). There is clearly no obligation on the Board to accept at face value the reason advanced by the employer. The concurrent existence of an otherwise valid reason for the discharge of an employee does not preclude a factual determination that his discharge was discriminatory if it appears from a preponderance of evidence, and the reasonable inferences drawn therefrom, that the discharge was in fact motivated by the employer's opposition to the employee's union activities. Ibid.

Since, however, there is no magic touchstone by which the trier of facts can determine with absolute certitude the motivations which prompt an employer's conduct in terminating the employee, we must look to the evidence, circumstantial, as well as direct, and the reasonable inferences therefrom.

The record is replete with evidence of Respondent's hostility toward the Union; its systematic interrogation of employees; threats of reprisals; studied attempts to persuade the employees to renounce the Union and deal directly with the employer; its bitter resentment toward Wetherill for what it considered his base ingratitude in organizing the crew, after the favors it had shown him; and other acts of interference, restraint and coercion, previously detailed. When there is considered against this background the undenied remark of Swartz, Wetherill's former supervisor, to Jordan, two days after Wetherill's discharge, to the effect that Wetherill "had had his neck stuck out a mile because of the union business," Respondent's motivation becomes increasingly apparent.[53]

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53. Swartz was not called to testify, and there was no showing that he was unavailable. It may, therefore, be assumed that his testimony would have been adverse to Respondent. As to Respondent's contention that he was not a supervisor at the time he made the remark, the record discloses that, although the job of sound technician was abolished, Swartz, himself, assuming the duties of sound console operator, there was no showing that he had been relieved of his supervisory duties, and that the employees had been so advised. Moreover, since the views he expressed reflected similar views of other responsible supervisors and management officials, the undersigned finds that his remarks are attributable to Respondent. It is true, as Respondent argues, that most of the incidents which have been adverted to occurred after September 1, the date of Wetherill's dismissal. This, however, does not preclude the consideration of this evidence in evaluating Respondent's motive for the discharge, first, because it is reasonable to assume that Respondent's opposition to the unionization of its employees did not develop suddenly, but had existed both before and after the event of the discharge; second because they furnish evidence of

Further evidence of Respondent's actual motivation is to be found in the circumstances which immediately preceded Walker's return to work. This evidence discloses that after agreeing with Walker that he could report for work on September 4, Barkow made an urgent call to Walker several days earlier, asking him to report for work on September 1. This prompted Walker to ask whether "somebody had broken a leg." Barkow admonished him to "keep his mouth shut." Although Respondent contended that its true purpose in advancing the date of Walker's return, was to afford him a chance to become "reoriented" to the stage, this explanation was wholly unconvincing. The evidence reveals that there was an unusual need for manpower at the time in connection with the assembling and rigging of heavy scenery for the show opening the following week, and Wetherill was actually working on this scenery when he was summarily terminated, rather than laid off, ostensibly to make room for an employee who admittedly required a period of reorientation.

It is significant that, although Vincent had steadfastly maintained that the stage crew had been overstaffed, he at no time took any steps to reduce the size of the crew

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the employer's underlying motive. As the Court has held in an analagous situation, "The company contends that any antiunion statements made by company officials, after . . . the date of [the employee's] discharge, have no relevancy. We do not agree. Such statements, reflecting the attitude of the company toward the union at a period closely following the date of [the] discharge, indicate what its attitude undoubtedly was immediately preceding that event. *Joy Silk Mills, Inc. v. N.L.R.B.*, 87 U.S. App. D.C. 360, 185 F. 2d 732, 742." *Angwell Curtain Company, Inc. v. N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7). See, also, *N.L.R.B. v. Entwistle Manufacturing Company*, 120 F. 2d 532, 535 (C.A. 4); *N.L.R.B. v. Homedale Tractor & Equipment Company*, 211 F. 2d 309, 314 (C.A. 9); *N.L.R.B. v. Cousins Associates, Inc.*, 283 F. 2d 242, 243 (C.A. 2).

prior to the advent of the Union. In this regard, it should be noted that the dismissal of Wetherill made no difference in the size of the crew, because his position was filled by Walker.

Finally, the record discloses that early in August, 1963, in a discussion about the possible effect upon the stagehands of the new Wage-Hour Law, Producer Barkow told Lovelady that it appeared as if Respondent was faced with the alternative of scheduling a seven-hour day, six-day workweek, or hiring three additional stagehands, to avoid payment of overtime. Barkow volunteered that Lein and Vogt had been urging him to hire additional men because, as things were, Vogt had been obliged to do relief work at the spotlight and light board, and Lein had been complaining that he had been unable to give his men vacations and time off. The employment of the two additional men, Lein said, would relieve that problem.[54]

Upon the basis of the foregoing, and upon the preponderance of the credible and reliable evidence, considered on the record as a whole, the undersigned is convinced and finds, that Respondent discharged Wetherill because of his union activities, thereby discriminating in regard to the hire or tenure of his employment to discourage membership in a labor organization, in violation of Section 8(a)(3), and interfering with, restraining or coercing

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54. Although it later developed that the amendment to the Fair Labor Standards Act did not affect the employees involved, according to Barkow, he did not learn of this until sometime in October, and Brigham testified that he did not receive a formal ruling to this effect until November 21, 1963, (a date which he recalled as the day before the late President Kennedy's assassination). In either case, this was not until over a month after Wetherill's discharge on September 1.

employees in the exercise of the rights guaranteed in Section 7, in violation of Section 8(a)(1) of the Act.[55]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in Section III above, occurring in connection with its operations described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, by the conduct described above, it will be recommended that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having also found that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Robert H. Wetherill, it will be recommended that Respondent offer him immediate and full reinstatement to his former or substantially equiv-

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55. The undersigned has considered Respondent's argument that the decision of the Board of Review upholding Wetherill's discharge should be accorded the same weight as an arbitrator's decision and award. The hearing before the Board of Review amounted to little more than the submission of a grievance to a Board consisting of two representatives of management and one employee representative. The Board was created by the unilateral action of the employer under a procedure outlined in the employees' handbook. It was not the terminal point of a grievance procedure established by contract. It was accompanied by none of the safeguards for a full and complete hearing, such as opportunity for cross-examination, representation by counsel, and assurance of a fair and impartial hearing.

alent position without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, by payment to him of a sum of money equal to that which he would normally have earned as wages from the date of his discharge to the date of Respondent's offer of reinstatement, less his net earnings during said period, in a manner consistent with Board policy, as set out in *F. W. Woolworth Company,* 90 NLRB 289. Interest on backpay shall be computed in the manner set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the undersigned makes the following:

VI. Conclusions of Law

1. Respondent, Harrah's Club, is, and at all times mentioned herein, has been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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3. By discharging Robert H. Wetherill on or about September 1, 1963, because of his union or other protected activities, Respondent has discouraged membership in a labor organization in violation of Section 8(a)(3), and has thereby interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7, thereby violating Section 8(a)(1) of the Act.

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5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record of the case, the undersigned recommends that Respondent, Harrah's Club, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

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(b) Discouraging membership in a labor organization by discharging, refusing to reinstate, or in any other manner discriminating against any of its employees in regard to their hire or tenure of employment or any term or condition of employment

* * * * * * *

2. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Robert H. Wetherill, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, as set forth in the section of this Decision and Recommended Order entitled "The remedy."

* * * * * * *

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and all other rights under the terms of this Recommended Order.

(d) Post at its Club, Stateline, Nevada, copies of the notice attached hereto marked "Appendix." Copies of said

Twentieth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to such employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twentieth Region, in writing, within 20 days from the date of the receipt of this Decision and Recommended Order, what steps Respondent has taken to comply herewith.

Dated: Oct 16 1964

/s/ IRVING ROGOSIN
Irving Rogosin
Trial Examiner

Appendix D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.) are as follows:

Short Title and Declaration of Policy

Sec. 1.(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantial minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Findings and Policies

Sec. 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to

strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

* * * * * * *

Definitions

Sec. 2.(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Sec. 2.(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * *

Limitations

Sec. 14.(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the

Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employees, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

Sec. 14.(c)(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

JAN 18 1967

No. 888

SUPREME COURT, U. S.

In the

Supreme Court of the United States

OCTOBER TERM, 1966

HARRAH'S CLUB,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF ALLADIN HOTEL, DESERT INN HOTEL, DUNES HOTEL, HACIENDA HOTEL, HOTEL RIVIERA, SAHARA HOTEL, SANDS HOTEL, STARDUST HOTEL, THUNDERBIRD HOTEL, HOTEL TROPICANA, EL CORTEZ HOTEL, FREMONT HOTEL, HORSESHOE HOTEL, GOLDEN GATE, PIONEER CLUB, MINT HOTEL, CALIFORNIA CLUB, LAS VEGAS CLUB, LUCKY STRIKE AND THE NEVADA RESORT ASSOCIATION TO PARTICIPATE AS AMICUS CURIAE AND TO FILE ATTACHED BRIEF IN THAT CAPACITY.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1966

No. 888

HARRAH'S CLUB,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO PARTICIPATE AS AMICUS CURIAE

SIDNEY R. KORSHAK, DAVID H. MENDELSOHN, and FREDRIC N. RICHMAN, on behalf of ALLADIN HOTEL, DESERT INN HOTEL, DUNES HOTEL, HACIENDA HOTEL, HOTEL RIVIERA, SAHARA HOTEL, SANDS HOTEL, STARDUST HOTEL, THUNDERBIRD HOTEL, HOTEL TROPICANA, ET AL., and the NEVADA RESORT ASSOCIATION, petition this Honorable Court for permission to participate in the above-captioned matter as amicus curiae, and to file the attached brief instanter in that capacity in support of the position of Harrah's Club only insofar as it relates to the question concerning the propriety of the National Labor Relations Board exercise of jurisdiction over the Nevada Gaming Industry.

The parties have been advised of this Motion; counsel for Harrah's Club have consented to the intervention of this petitioner; counsel for the National Labor Relations Board has not consented. Service is made on both parties simultaneously with the filing of this Motion.

The Nevada Resort Association is a non-profit Nevada corporation whose members include all of the above named resort hotels and other hotels and gaming casinos in Las Vegas, Nevada.

The Ninth Circuit has sustained the Board's exercise of jurisdiction over the legal Nevada gaming industry. As a result, the interest of the members of the Nevada Resort Association have been severely affected and therefore are substantially interested in the instant appeal.

In view of these facts, your petitioners believe that an analysis of the facts and law by counsel representing a substantial number of those persons upon whom the impact of the Board's decision is most direct, will be helpful to this Court.

Petitioners ask that they be granted leave to file the attached Brief of the Alladin Hotel, Inc., et al., and Nevada Resort Association as amicus curiae in support of the position taken by Harrah's Club.

Respectfully submitted,

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BRIEF OF ALLADIN HOTEL, DESERT INN HOTEL, DUNES HOTEL, HACIENDA HOTEL, HOTEL RIVIERA, SAHARA HOTEL, SANDS HOTEL, STARDUST HOTEL, THUNDERBIRD HOTEL, HOTEL TROPICANA, ET AL., AND NEVADA RESORT ASSOCIATION AS AMICUS CURIAE

QUESTION PRESENTED

The appeal calls for review of the decision of the Court of Appeals for the Ninth Circuit in which the decision of the National Labor Relations Board to exercise jurisdiction over the legal gaming industry in Nevada was sustained, despite the continued refusal of the National Labor Relations Board to assert jurisdiction over an identical industry, to-wit: the horse racing industry. In effect, the question is: Was the National Labor Relations Board arbitrary and capricious, and did it abuse its discretion in deciding to assert jurisdiction over the Nevada Gaming Industry?

SUMMARY OF THE ARGUMENT

For many years the Board has consistently declined to exercise jurisdiction in the horse racing industry and other business enterprises related thereto because race track operations are essentially local in character and are subject to detailed state regulation. The legal gaming industry in Nevada being a substantially similar business activity as that of the race track operations is essentially local in character and is subject to detailed state regulation, perhaps more so. To assert jurisdiction over the Nevada Gaming Industry while steadfastly refusing to assert jurisdiction over racetracks is inherently discriminatory and a clear abuse of discretion.

In addition, the decision of the Ninth Circuit erroneously insisted that in view of the Board's declination of jurisdiction over the horse racing industry it is incumbent upon the Nevada Gaming industry to show how it was prejudiced by such a result. On the contrary, however, the Administrative Procedures Act demands that the Reviewing Court shall set aside an administrative agency determination where it is found to be arbitrary, capricious or an abuse of discretion. Congress has not intended the Ninth Circuit to conclude that the Nevada Gaming Industry establish that it was prejudiced by the Board's failure to assert jurisdiction over racetracks and related enterprises.

ARGUMENT

The Board Does Not Have Jurisdiction Over the Nevada Gaming Casino Industry and Its Assertion Thereof in Light of Its Non-Assertion in Race Track Industry Cases Is a Clear Abuse of Its Discretion

The Board's exercise of jurisdiction over Petitioner, as well as other Nevada gaming casinos (See *El Dorado, Inc.*, 151 NLRB No. 82 58 LRRM 1455) is improper, arbitrary and capricious because of:

(a) Its historical declination of jurisdiction in the horse racing industry, an almost identical business activity;

(b) The strict regulations imposed upon Nevada gaming casinos by the State, counties and cities;

(c) Gaming casino activities are, in fact, entertainment and amusement enterprises;

(d) A labor dispute in the Nevada gaming casino industry would have little or no impact or effect on interstate commerce;

(e) The Board's exercise of jurisdiction produces unseemly conflict between Federal and State authorities;

(f) There are no goods produced for commerce;

(g) Activities of gaming casinos and employees are purely local in nature;

(h) The exercise of jurisdiction does not effectuate the policies of the Act.

I. Power and Authority of the National Labor Relations Board

A. Power of the Board

It was the intent of Congress to give the Board ". . . the fullest jurisdictional breadth constitutionally permissible

under the Commerce Clause."[1] Today, this means that if the employers involved are within the ambit of the statutory definition of the term "employer" and if the employers' operations be considered to "affect" commerce within the rule of the decisions, such operations can be subjected to Board scrutiny. Whether or not, as a result of this scrutiny, jurisdiction will be asserted rests *in the sound discretion of the Board.*[2]

B. Discretion of the Board as to Assertion of Jurisdiction

Early recognizing the reality of time and expense considerations, the Board, through necessity, exercised its discretion and developed a system of dollar standards for jurisdictional purposes. These dollar volume demarcations were many and varied; they were significantly increased for like reasons, but policy considerations, more money and manpower later led to the reduction of the dollar amounts and to the simplification of the industrial concepts into two broad fields—retail and non-retail. The Court has approvingly pointed out that even when these dollar volume amounts are present, since they are only a quantitative standard, that ". . . the Board sometimes declines to . . . assert jurisdiction as not effectuating the purposes of the Act."[3]

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[1] *NLRB* v. *Reliance Fuel Corp.*, 371 U.S. 224, 52 LRRM 2046.

[2] See: *Office Employees, I.U.*, v. *NLRB*, 353 U.S. 313, 40 LRRM 2020, where both the majority and the dissenting opinions agreed that the employer therein met the definition of "employer" but that the policy of non-assertion of jurisdiction was not properly applied. However, both opinions recognized the power of the Board. See: *NLRB* v. *Denver Bldg. & Constr. T. Council*, 344 U.S. 675, 28 LRRM 2108.

[3] *NLRB* v. *Denver Bldg. & Const. T. Council*, supra.

Thus, from an apparent innate sense of the constitutional power of Congress and of the dual federal-state system, contemporaneously with the development of those monetary demarcations, the Board also developed in specific businesses or industries an outright policy of non-assertion of the jurisdiction. A number of businesses were affected: *the race tracks,* non-profit institutions generally, *the entertainment or amusement industry,* hotels, unions as employers, proprietary hospitals and others. This was done on an ad hoc basis, industry by industry, year by year, just as the discretionary common law writs were developed. Likewise, just as the instances of application of the common law writs are difficult to rationalize (even though they have been applied over some 400 years), so the application of the comparatively recent and yet emerging policies of non-assertion of jurisdiction by the NLRB have been difficult to rationalize, other than on an industry basis.

Nonetheless, analysis of the cases where a policy of non-assertion of jurisdiction was followed, as well as those in which this policy was asserted, but denied, is most interesting. Putting aside for the moment cases where the dollar volume demarcations were strictly observed (cases where the employers' operations were clearly within the commonly understood terms "trade or commerce" (*Federal Baseball Club, etc.,* 259 U.S. 200) it is noted that the two common tests which seem to compel (or at least importantly complete) a finding that the policies of the Act will not be effectuated by the assertion of jurisdiction are *"detailed regulation" by* and *important tax revenue flowing from Employers' operations to the state.*

Other factors are, of course, considered, but it is submitted that when the facts show licensing, control and regulation of an employer's operation and personnel by

the state and substantial tax revenue flowing to the state, the Board has disregarded large dollar amounts and followed the policy of non-assertion. This usually occurs when the employers' operations do not constitute "trade or commerce" as the terms are commonly understood (*Federal Baseball Club, etc.,* supra; *Los Angeles Turf Club,* 90 NLRB 20, 26 LRRM 1154), but are unique and peculiar and involve purely local transactions.

As noted, the policy of non-assertion of jurisdiction is an emerging or developing policy. It will be recalled that the sphere of operation of the NLRA and in consequence the extent of the mantle of NLRB jurisdiction was not entirely clear until *Guss*[4] and *Garmon*[5] were decided. A "no-man's land" was developing prior to these decisions and these decisions did not effectively dispel it. There remained a large area where the states could not act and the Board declined. The only predictable results were due to the consistent adherence by the Board to its policies of non-assertion of jurisdiction in certain industries and to its jurisdictional standards—but the latter varied with the exigency of the circumstances in which the Board found itself. It was not content to do a "half-way" job, so it still refused jurisdiction in proper cases.

This right of the Board to exercise this discretion to accept or decline jurisdiction was recognized and exercised for many years before Congress took notice.[6] When Congress took notice and acted, it expressly ratified the policies of non-assertion theretofore established by the Board by the enactment of § 14(c) of the Act.[7]

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[4] *Guss* v. *Utah Board,* 353 U.S. 1, 39 LRRM 2567 (1957).

[5] *San Diego Bldg. T. Council* v. *Garmon,* 359 U.S. 236, 43 LRRM 2838 (1959).

[6] *NLRB* v. *Denver Bldg. T. Council,* 344 U.S. 675.

[7] *Leedom* v. *Fitch Sanitarium,* 294 F.2d 251 (CADC-1961).

C. Board Policies of Non-Assertion of Jurisdiction Were Ratified by § 14(c) of the Act

In adopting this section, Congress also was concerned that the then existing monetary standards as of August 1, 1959 were continued. This surely constituted approval of the policies theretofore expressed by the Board as well as the method used by the Board to enunciate them. However, Congress did more. It also permitted the states to act in areas declined by the Board through any agency or court. This solved the "no-man's land" problem as to appropriate tribunals.

The entire section (§ 14(c)) clearly evidences Congressional intent to create a means or mode by which states can exercise jurisdiction in addition to the cession provided in § 10(a) which appears to require a little NLRA. Such is not required with respect to this discretionary power of the Board. (Similarly, as dual expert bodies, the Nevada Gaming Commission and the State Gaming Control Board were delegated wide discretions in enforcing the Nevada gaming laws and regulations and in policing the industry [Nev. Rev. Stat. §§ 463.130, 463.150, 5.010].)

The criterion for this discretion is whether or not any labor dispute which might arise involving employer's operations will have an effect on commerce substantial enough to warrant the exercise of Board jurisdiction.

Surely then, in declining to assert jurisdiction in cases sufficiently unique to require existing state regulation and control where motivation to act is supplied by large tax revenues, the Board is warranted (a) in believing that the test of § 14(c)(1) is met, and (b) that the opportunity given the state by subsection (2) to act will be exercised (the state having already acted in the field).

It thus appears that the Board has the authority to apply its policy of non-assertion of jurisdiction when, in its discretion, it deems that substantial evidence on the record warrants its application. In view of the congressional mandate, where both precedent and reason support a policy of non-assertion of jurisdiction, it will be applied.

D. The Board's Discretion Cannot Be Exercised Arbitrarily

The Administrative Procedure Act, 5 USCA § 1009(e) provides that a Reviewing Court shall act to set aside an administrative agency's findings and conclusions which are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; . . ."

We respectfully suggest that the Board's assertion of jurisdiction over the Nevada casino gaming industry in light of its refusal to assert jurisdiction over the race-track gaming industry constitutes such an abuse of discretion as would warrant this Court to act within the ambit of its authority as set forth above.

II. Board Policy of Non-Assertion of Jurisdiction in Industry Classified as Horse Racing Is Really a Policy of Non-Assertion of Jurisdiction in the Gambling Industry and Is Controlling Here

The Board policy of non-assertion of jurisdiction has been discussed more fully and reviewed more often in the horse racing business than in any other field.[8] In these opinions, the Board has repeatedly affirmed that horse racing itself as well as other businesses connected therewith and dependent thereon are essentially local in character and do not substantially affect commerce. This atti-

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[8] See, e.g., *Walter A. Kelley*, 139 NLRB 744, and cases cited therein.

tude as to the race track industry, morever, is in sharp contrast with recent Board decisions in connection with other areas of the broad field of entertainment and amusement.[9] Therefore, the factors which distinguish horse racing from amusement parks or motion pictures or boat tours are singularly important in the determination of this case. It takes only slight reflection to see the answer. Wherein nearly all other forms of entertainment are actually entertaining, *in and of themselves,* horse racing in and of itself, though possibly enjoyable to the owners, is hardly entertaining to most people who attend.

> "The increasing public interest in horse racing over baseball has little to do with the horses. The great majority of race fans know nothing about horses and care less. Watching the gees-gees circle the track soon becomes monotonous; the excitement in the stands is due to the financial stake the spectators have in the race. This is also why the 35 dog tracks in the seven states that permit greyhound racing are today almost always jammed to capacity. Elephant races would draw the same crowds if they offered the same opportunity for getting a bet down." (Scarne, *Scarne's Complete Guide to Gambling*, p. 36, third paragraph, 1961.)

The enjoyment, the entertainment, the thrill, the very purpose of going to the track is betting on one's favorite horse. The truth is, therefore, that the horse racing industry is nothing more than one phase of the gambling industry. The races are but a series of events, the outcome of which may be the subject of wagers or bets.

Having determined the essential characteristic of racing, we should now try to discover why this characteristic necessitates distinctive treatment. In other words, why has the Board declined jurisdiction in the gambling industry?

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[9] E.g., *Coney Island, Inc.*, 140 NLRB 77; *Ray, Davidson & Ray,* 131 NLRB No. 54.

The Board has revealed the reason time and again. Gambling, in the form of horse racing, is strictly controlled and regulated by state authorities. It is a state-created monopoly which is a vital element in a state's economy.[10] Thus, the state not only has a selfish interest in preserving the healthy operation and expansion of gambling on the horses, but it also has the duty of protecting the public, the employees, and the employer from the risks to which gambling is subject. In addition to actions of jockeys, themselves, in holding a horse back unnecessarily, using or not using spurs, etc., the horse could be a "ringer," or the horse could be doped to win or lose.[11] In view of this kind of analysis, the Board has wisely elected to decline jurisdiction. The ultimate reason is clearly spelled out in *William H. Dixon*:

> "[W]e do not believe that our declination of jurisdiction will leave the area of labor relations unregulated. We do not believe that state 'labor relations acts' are the only means of regulation. Nor do we regard state labor relations boards as the only state tribunals through which a state may assert jurisdiction over labor disputes, especially in view of the congressional policy ceding to any state agency or any state jurisdiction in those areas where we decline it."[12]

Thus, the Board has consistently recognized that the combination of (a) strict regulation and control by the state and (b) economic dependence by the state on the industry insures that *no labor dispute* in that industry will be permitted to have a substantial adverse effect on interstate commerce.

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[10] See *Walter A. Kelley*, supra, n. 8.

[11] Scarne, *Scarne's Complete Guide to Gambling*, p. 61, "Crooked Horse Racing" 1961.

[12] 130 NLRB 1204.

An analysis of horse racing and casino gambling demonstrates that the "reason for the rule"—the underlying cause of state licensing, regulation and control in each industry—is exactly the same.

1. Both horse racing and casino gambling are "legalized gambling."

2. Both businesses earn moneys as a percentage of the wagers placed by patrons, *Los Angeles Turf Club*, supra.

3. The wagers in both businesses are placed on the outcome of a series of events—horse races at the track, dice rolls (or the turn of cards at 21, or the appearance of certain symbols in combination on the slot machines) in casinos.

4. The state takes a percentage of wagers placed in both cases, plus licenses, etc.,

5. The law provides for the licensing of race track operators, agents and employees—the law in Nevada provides for the licensing of casino operators, agents and employees,

6. The underlying reason for such licensing in both cases is the high risk of security and integrity in both industries,

7. The need for security and integrity in both industries is due to the risks involved in gambling in both businesses, supra.

8. The results—win or loss—at horse racing depend on chance plus a number of variables.

The results—win or loss—at casino gambling depend on chance plus a smaller number of variables.

9. The odds in horse racing are initially fixed by the Track by the "pricemakers" or "handicappers" as the Track Line odds. Variables entering into the calculation are the record of each horse and of each jockey in past races, track conditions and other factors. "The Morning Line" odds appearing in the newspapers are prepared by the newspaper handicappers. Thereafter the odds change as bets are placed, going up or down depending on the amount of money wagered on a horse. Taxes and charges for operating the races are elements of the calculations.[13]

In casino gambling, the odds are fixed by the casino based on mechanical and mathematical laws of probability; with two dice there are 36 combinations, etc., etc.[14] Taxes are included in the charge for operating the games, which is an element of the calculations.

10. Both horse racing and casino gambling furnish a number of incidental services to patrons which are expected by the patrons and therefore necessary to successful operation. These services are food and drink for patrons and track and casino personnel, and in some casino operations, hotel rooms for patrons. Whether these services be furnished by the track or casino operator or by a third party, they are services which are only incidental to the gambling. As such, these services clearly come under the mantle of the

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[13] Scarne, *Scarne's Complete Guide to Gambling*, pp. 41-43, "The Track Line and The Morning Line"; p. 48, "How the Totaliser and the Pari-Mutuel Systems Work;" p. 52, "How Nickel and Dime Breakage Work"; p. 56, "How the State and Track Cuts Beat Down the Players"; 1961.

[14] *Id.*, p. 250; p. 273.

policy of non-assertion of jurisdiction possessed by the track and casino operators.[15]

Can casino gambling be distinguished in significant characteristics from the gambling industry in other states, i.e., horse racing? The answer is clearly "no." Thus, the exercise of jurisdiction by the Board is clearly an abuse of its discretion.

Many courts have had the opportunity to define "gambling," and all the definitions apply to casino gambling and horse racing equally well. The Court of Appeals for the District of Columbia Circuit stated a very brief, but inclusive, definition: "To gamble, as is well known, is to risk one's money or other property upon an event, chance or contingency in the hope of the realization of gain . . ."[16] It is clear, therefore, that the subject matter is identical.[17] Do any of the surrounding circumstances require a different rule for casino gambling? The answer is "no" because the significant surrounding circumstances are also nearly identical. In fact, the system of control and regulation in Nevada is even more extensive and thorough than the related regulation of horse racing. Furthermore, the State of Nevada is even more concerned with maintaining a healthy

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[15] *Hotel and Restaurant Employees, Union,* 148 NLRB No. 20, (1964). It will be recalled that in *Los Angeles Turf Club,* 90 NLRB, these necessary but incidental services were also rejected as a basis for denial of the policy of nonassertion of jurisdiction.

[16] *Washington Coin Mach. Ass'n.* v. *Callahan,* 142 F.2d 97 (D.C. Cir.).

[17] For example, cases which hold that betting on horse races is a form of gambling, see *People* v. *Sullivan,* 60 Cal. App. 2d 539, 141 P. 230; *Young* v. *State,* 173 Tenn. 469, 121 S.W. 2d 533; *State* v. *Ak-Sar-Ben Exposition Co.,* 121 Neb. 248, 326 N.W. 736.

industry, for, should gambling disintegrate in Nevada, "the state would blow away."[18] Therefore, the ultimate grounds for attributing significance to state control and economic interests, as expressed in *William H. Dixon,* 130 NLRB No. 122, 4, and *Flatbush General Hospital,*[19] are stronger in the instant case than in the aforementioned horse racing cases. Consequently, it is not urged merely that the racing cases are closely analogous, but rather that they are well-reasoned and long-established procedent for the non-assertion of jurisdiction in the gambling industry—whether it be on the outcome of a series of races, or on the outcome of (a) rolling the dice, (b) the turn of a card, or (c) the appearance of a combination of symbols on three spinning reels in a slot machine.

III. Nevada Strictly Regulates and Controls the Gambling Industry

The entire system of Nevada regulation and control is based on the central factor that the right to *operate* or to *work* in a casino gambling establishment is a state-granted dispensation, a revocable privilege. This appears in the statement of policy:

> "1. It is hereby declared to be the policy of this state that all establishments where gambling games are conducted or operated or where gambling devices are operated in the State of Nevada shall be licensed and controlled so as to better protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada.
>
> "2. Any license issued pursuant to this chapter shall be deemed to be a *revocable privilege* and no holder thereof shall be deemed to have acquired any vested rights therein or thereunder." (Emphasis supplied.) § 463.130.

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[18] *El Dorado, Inc.* 151 NLRB No. 82.

[19] 126 NLRB No. 22.

At every turn, the applicant is reminded of this revocable privilege (Nev. Rev. Stat., §§ 463.140; 463.170; 4.010; 4.020) by the state.

Both county and city ordinances also classify the right to engage in gambling as an *operator* or an *employee* as a privilege, and retain power to revoke registration permits granted. (Henderson Nev. Ordinance § No. 10, § 9; Las Vegas Municipal Code Ord. 6-5-5 [can be revoked for conviction of two misdemeanors or a felony]; Clark County Ordinance No. 121, § 21; Regulation G-11-61, § 2.)

Fingerprints are required of all *owners, lessees* and *employees* by the State (Nev. Rev. Stat. § 463.150-2(c); § 4.030-3; § 5.100), by the Clark County (Ordinance 121, preamble; §§ 1 and 2; Regulation G-11-61 § 5(e); and by cities (§ 6-5-2 of Chapter 5, Las Vegas Municipal Code, Henderson Nev. Ordinance No. 43, § 2.)

And so the record goes; regulation upon regulation. The requirements extend to *all gambling operators* and *employees* and to other employees in other trades, such as taxi drivers, and to porters, maids, bartenders (but only when employed in connection with a gambling casino). The State Gaming Control Board is more concerned about unsavory characters employed in gambling than it is with the maid who might steal towels. The State Gaming Control Board does not get into the area of wages or hours generally, but they stopped a casino operator who was working women for shifts considered too long. The Nevada Gaming Commission has power to regulate anything directly related to the administration of the industry and could control hiring and firing practices. *El Dorado, Inc.* supra.

The state and county expressly prohibit anyone from associating with ". . . persons of notorious or unsavory

character or reputation or with extensive police records . . . either socially or in business affairs. . . ." Negotiation of a contract which affected the gaming industry with such a person would be "business affairs" within the statute. And if this person were a union business agent with whom the licensee (employer) was forced to negotiate by Federal law (which is not as strict as Nevada Gaming Law), an unseemly conflict would inevitably follow.

Enforcement policies are firm; public hearings are provided (§§ 643.312; 7.030) with the right of judicial review (§§ 463.315; 7.149). The control is necessary for security and integrity of the industry and there should not be any interference with this authority over this industry for such reasons.

In spite of all of this regulation and enforcement, cheating continues and it is difficult to catch as there are hundreds of ways to cheat a slot machine. Only about 50% of cheats are detected even though undercover enforcement people go around incognito to check. The reason for regulation is the casino, but it *extends to any hotel connected with it, without regard to ownership, management or control.*

In summary, the system of regulation and control of the gambling industry in Nevada is complete and quite comprehensive. It presently requires licensing, fingerprinting, investigation and many other items.

The Nevada Gaming industry is totally subjected to the state's control. There are no casino operations which are not subject to state control.

IV. The Vast Economic Importance to the State of the Tax Revenue and Jobs Provided by the Gambling Industry Is a Matter of Common Knowledge.

It is worthwhile to examine the impact of gambling on Nevada's economy. Approximately 30,000 persons are employed either directly in the gambling business or in unrelated dependent businesses. Furthermore, the amount contributed directly by the Nevada Gaming Commission to the general fund was 28.86 percent of all revenues for the fiscal year 1963-1964. That this revenue is vital to the State is apparent from the large percentage of state income it affords, and, also, from its many and varied uses in the "general fund." In addition to this, further amounts were paid by way of taxation to the counties and cities. The indirect impact can only be estimated; however, it has been reliably suggested that gambling supports roughly 60% of the general economy of the state. The Federal Courts have recognized that the gambling industry may well be the principal industry of the state.[20] In view of the aforementioned statistics, it can hardly be denied that the *proper control of gaming and continuation of the flow of revenues derived from gaming is a matter of life and death to the State of Nevada and its inhabitants.*

V. Although Horse Racing Occurs in Many States and a Great Deal of Transportation Is Involved, Casino Gambling in Nevada Is Confined to One State by Law.

A. By federal law there can be no shipment of gambling devices or paraphernalia out of state, although it can be shipped into Nevada. Title 15, §§ 1171, et seq., prohibit shipment of gambling devices and paraphernalia in interstate commerce. § 1172 provides that a state where (a) gambling

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[20] *Berman* v. *Riverside Casino Corp.*, 323 F.2d 977, 978 (9th Cir. 1963).

is legal, may (b) adopt a law exempting itself from the prohibition as to interstate shipment of such items *into the state*, but may not legally ship them out. This Nevada has done (Nev. Rev. Stat. §§ 463.410, 463.420).

NOTE: These carefully drafted provisions of federal law recognize state power; it appears they were tailored to permit Nevada to continue its state gambling business. It is the only state which permits legal casino gambling.

B. State law does not permit any licensee to own, directly or indirectly or be associated in any way with any gambling activities in other states. (Nev. Rev. Stat. § 3.060.) No doubt this is due to the fact that casino gambling is illegal elsewhere in the United States; a further reason is to insure the complete separation of Nevada gambling from all outside illegal interests, notorious and unsavory characters.

VI. All Interstate Aspects of Employers' Operations Are Minimal and Do Not Require a Denial of the Policy of Non-Assertion of Jurisdiction Long Established as to Gambling

A. No Jurisdictional Standard Is Applicable to Casino Gaming Operations

First, it must be observed that as the Board carefully pointed out in *Hialeah Race Course, Inc.*, 125 NLRB No. 57, and other cases involving other industries as to which there were no jurisdictional standards in existence on August 1, 1959,[21] the Board was free to use its discretion as to the assertion or non-assertion of jurisdiction in accordance with the Congressional mandate provided by the enactment of § 14(c) of the Act. In *Hialeah*, supra, Board precedent

[21] *Flatbush General Hospital*, 126 NLRB No. 22, approved, *Leedom* v. *Fitch Sanitarium*, 294 F.2d 251 (D.C. Cir., 1961).

(*Los Angeles Turf Club*, supra)[22] established a contrary standard—one of non-assertion of jurisdiction, which was in effect on August 1, 1959. We have demonstrated that these cases are controlling precedent in this case, because (a) the reason for the state control *is the gambling at horse races* (horse racing being only one of the modes of gambling—just as casino gambling is but another mode), (b) the same reasons for the "detailed state regulation and control" in the horse racing industry are very much in evidence in casino gambling, (c) that such regulation exists, in fact, was uncontradicted, and (d) that it is evident that Nevada *presently can and will* step in to prevent any labor dispute arising in employers' operations from substantially affecting commerce.

VII. THE NINTH CIRCUIT DECISION INCORRECTLY ESTABLISHES A NEW CRITERIA FOR REVIEWING THE PROPRIETY OF THE BOARD'S ACTION

The Ninth Circuit stated:

> "Assuming that the criteria applied by the Board in determining to exempt racetracks from regulation are equally applicable to gambling casinos in Nevada, this alone is not sufficient to establish that regulation of the gambling industry will result in unjust discrimination. It must also be shown that the gambling industry will be substantially prejudiced by Board regulation because racetracks are not similarly regulated. See *N.L.R.B.* v. *Gene Compton's. Corp., supra.*"

As pointed out above the Administrative Procedures Act merely provides that the reviewing court shall set aside the determination of an administrative agency where it was

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[22] 90 NLRB No. 10.

found to be arbitrary, capricious or constituting an abuse of discretion. Thus, it is apparent that the Ninth Circuit ignored the Congressional mandate, as aforesaid, but rather created a new rule, tailor-made for this case, to-wit: the Nevada Gaming Industry must prove that it will be substantially prejudiced by the Board's refusal to assert jurisdiction over the race track industry.

Manifestly, such a conclusion, by its very nature, is discriminatory, let alone the discriminatory nature of the Board's decision to exercise jurisdiction over one form of legalized gaming while declining to exercise jurisdiction over the other.

In the Board's decision and the Ninth Circuit decision neither adequately answered the contentions of the Nevada gaming industry. However, they implied that both forms of gaming are identical in nature, but the Board is free to act unhindered. On the contrary, the Board cannot abuse its discretion. This is precisely what has occurred herein.

CONCLUSION

No reason existed in law or fact for the Ninth Circuit's decision to sustain the Board's assertion of jurisdiction in the heavily regulated, state controlled, Nevada Gaming industry. Its standard for review are not contemplated by statute. The Board has baldly asserted that their declination of jurisdiction in racetrack gaming cases would not require them to forsake jurisdiction in the Nevada Gaming cases. Without reason, the Ninth Circuit erroneously refused to perform its responsibility.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 18, 1967

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 888

HARRAH'S CLUB, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7-14) is reported at 362 F. 2d 425. The Board's Decision and Order (R. 57-58, 13-50)[1] are reported at 150 NLRB 1702.

[1] "R" refers to the documents, including the Board's decision and order, contained in Volume I of the record in the court below. "Tr." refers to the transcript of testimony contained in Volume II. References designated "GCX", "RX", and "CPX" are to exhibits of the General Counsel, petitioner (respondent below), and the Union (charging party below), contained in Volume III. Only an abridged version of the decision of the Trial Examiner (R. 13-50) is reproduced in the petition (Pet. App. 17-40).

JURISDICTION

The decree of the court of appeals was filed on July 11, 1966, and on August 5, 1966, a petition for rehearing was denied (Pet. App. 1-2). On October 17, 1966, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including December 20, 1966 (Pet. 2), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board reasonably exercised its discretionary authority in asserting jurisdiction over an employer who operates gambling casinos and related restaurant and entertainment facilities in the State of Nevada, where the business has annual gross receipts in excess of $500,000, and annually purchases and receives materials directly from points outside of Nevada valued in excess of $50,000.

2. Whether substantial evidence supports the Board's finding that the employer discharged an employee because of his union activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix D to the petition (pp. 41-43).

STATEMENT

A. *The Board's Findings of Fact*

1. *Petitioner's business operations*—Petitioner, a Nevada corporation with its main offices in Reno, owns and operates gambling casinos, restaurants, bars, and entertainment facilities in Reno and Stateline, Nevada. The largest operation in petitioner's complex is Harrah's Tahoe, located at Lake Tahoe in Stateline, Nevada. It contains the South Shore Room, a theatre-restaurant which accommodates 700 guests and features leading performers in the entertainment field. This case arose from the Union's [2] attempt, in August-October 1963, to organize the stage technicians who provide the technical services for stage productions in the South Shore Room (R. 14-15).

At the hearing before the Board, petitioner stipulated that, in the year preceding the events herein, it had purchased and received materials directly from points outside of Nevada valued in excess of $50,000. During the same period, its gross receipts from the sale of goods and services were in excess of $500,000. (R. 14; Tr. 321-322, 5-6.)

2. *The discharge of Wetherill*—On August 30, 1962, petitioner hired Robert H. Wetherill to run the sound console [3] in the South Shore Room (R. 37; Tr.

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[2] International Alliance of Theatrical Stage Employees and Motion Picture Operators of the United States and Canada, Local 363, AFL-CIO.

[3] The sound console is the mechanism used to regulate sound amplification for the performances in the South Shore Room (Tr. 231, 244, 618). The sound console operator places microphones at appropriate places on the stage prior to the show,

11-13). At that time, the sound console operator and the stage technicians were in different departments. The sound console operator reported directly to the Sound Engineer who constituted the Sound Department, a subdivision of the Construction and Maintenance Department. The stage and lighting technicians reported to the South Shore Room Producer, and were in the Entertainment Department, a subdivision of the Public Relations Department. About a month after hiring Wetherill, however, petitioner abolished the Sound Department, eliminated the position of Sound Engineer, and brought the operation of the sound console into the Entertainment Department.[4] (R. 43-44; Tr. 519-523; RX 4.)

Wetherill operated the sound console until he became ill in May 1963. After an absence of several weeks, he returned about May 30, and was trans-

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and then operates the console during the performance (Tr. 232, 233).

[4] Contrary to petitioner's assertion (Pet. 17), this finding does not ignore "petitioner's organizational structure." Although petitioner submitted an organizational chart dated 1961 as evidence of its departmental structure, this chart is of little relevance in determining whether a change was subsequently made. Moreover, the record shows, *inter alia*, the following: Entertainment Department Supervisor Lein informed Wetherill shortly after he was hired that the sound console had been taken over by Lein's department and that he would sign Wetherill's time slips from then on (R. 43, n. 19; Tr. 60). Herb Swartz, Sound Engineer under the prior organization, verified this, informing Wetherill that the sound console operator now belonged in the Entertainment Department and that its supervisors would give him orders and sign his time slips (Tr. 922-924); and, thereafter Wetherill's time slips were in fact signed by Entertainment Department supervisors (R. 43, n. 19; Tr. 932-934; CPX 3).

ferred, at his request, to a job as a stage technician (R. 37; Tr. 11-12, 45-47).[5] Early in June, Wetherill became an unsalaried business agent for the Union and notified petitioner of his position (R. 37; Tr. 10, 14, 389, 554, 705, 616, 641).

On August 9, 1963, Wetherill informed petitioner that he had organized a majority of the stage technicians, and demanded that petitioner recognize the Union. Petitioner did not respond to the request, and, on August 14, Wetherill filed a petition for a representation election with the Board (R. 16; Tr. 19-22). Several supervisors immediately approached Wetherill, inquiring why he had not informed them of his organizing activity, and threatening that the advent of the Union would mean a reduction in staff (R. 16; Tr. 24-27). Supervisor Lein informed one employee that management "wouldn't trust Bob Wetherill anymore" because Wetherill had "stabbed them in the back" (R. 16-17; Tr. 76-77).

On August 30, Producer Barkow telephoned Charles Walker at his home, requesting that he report for work immediately and apologizing for cutting his vacation short.[6] Walker asked if something

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[5] Petitioner asserts (Pet. 18) that the "evidence was that [Wetherill] was not transferred but was hired in as a new employee." However, the record shows that Wetherill was transferred at his request (Tr. 11-12, 45-47), and that he was still on the payroll during his illness (Tr. 106, 35-36).

[6] Walker, a former stagehand, had been drafted into the Armed Forces. Upon his discharge, early in August, petitioner had offered him his old job as a stage technician, but both agreed that he would not report for work until September 4 (R. 46; Tr. 177-178).

had happened, or "if somebody had broken a leg." Barkow admonished him to keep his "mouth shut," and added that they would talk later (R. 46; Tr. 178). Walker arrived at the Club on August 31 and started work the following day (Tr. 170-171).

On September 1, petitioner discharged Wetherill, ostensibly "To make room for a man coming out of the service" (R. 38; Tr. 29).[7] Immediately after Wetherill's discharge, petitioner embarked on a vigorous anti-union campaign,[8] coercively interrogating employees about their union activities, threatening them with reprisals if the Union came in, and soliciting them to withdraw from the Union.[9] Despite

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[7] Walker had seniority over Wetherill in the Entertainment Department. However, if, as shown above (p. 4), Wetherill was attached to that department shortly after he was initially employed on August 30, 1962, rather than when he became a stagehand on May 31, 1963, he had seniority in that department over employees Jordan and McNerthney, both of whom were retained, in preference to Wetherill, when Walker returned to work (R. 41-43).

Moreover, although Entertainment Director Vincent had repeatedly stated that the stage crew was overstaffed, no steps to reduce the size of the crew were taken prior to the advent of the Union. Indeed, early in August 1963, in a discussion about the possible effect upon the stagehands of the new Wage-Hour Law, Producer Barkow told stage technician Lovelady that petitioner was faced with the alternative of scheduling a seven-hour day, six-day work week, or hiring three additional stagehands, to avoid payment of overtime (R. 47; Tr. 79-80).

[8] Two days after Wetherill's discharge, his former supervisor, Swartz, told employee Jordan that Wetherill "had had his neck stuck out a mile because of the union business" (R. 46).

[9] The Board found more than 20 individual incidents where petitioner interfered with, restrained or coerced employees

this campaign, the Union won the Board-conducted representation election (R. 15; GCX 2(c)). Shortly thereafter, Entertainment Director Vincent informed an employee that he would "never forget and forgive" Wetherill for doing "this thing to us," adding that it was "the same thing as if I had invited him into my house and he [sedueed] my wife" (R. 26; Tr. 106).

B. *The Decisions Below*

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that petitioner's business operations affected interstate commerce within the meaning of the Act (R. 14, 47, 57). The Board further concluded that petitioner had restrained and coerced its employees in violation of Section 8(a)(1) of the Act (see n. 9, p. 6, *supra*), and had discharged Wetherill because of his union activities in violation of Section 8(a)(3) and (1) (R. 35, 48, 57). The Board ordered petitioner to cease and desist from the unfair labor practices found, and to reinstate Wetherill with backpay (R. 48-50, 58).

The court of appeals sustained the Board's findings and enforced its order in full (Pet. App. 7-14).

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in the exercise of their statutory rights in violation of Section 8(a)(1) of the Act (R. 36-37). The court of appeals sustained these findings (Pet. App. 10), and petitioner does not contest them here.

ARGUMENT

1. In view of petitioner's annual purchases of materials and supplies in excess of $50,000, directly from points outside of the State of Nevada, it is clear that its operations are subject to the Board's legal jurisdiction. See *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224.[10] Moreover, although the Board has discretion to decline to exercise the full measure of its legal jurisdiction and has formulated certain standards to guide the exercise of that discretion,[11] the assertion of jurisdiction was in accordance with the applicable standard.[12] Petitioner

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[10] Petitioner does not seriously suggest otherwise (cf. Pet. 11). Indeed, petitioner's answer to the Board's complaint did not contest the allegation that petitioner's operations affected commerce within the meaning of the Act (R. 5-III, 9-10, 14).

[11] Section 14(c)(1) of the Act provides that:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

[12] The Board has asserted jurisdiction over gambling casinos and their related restaurant and other facilities where, as here, the annual gross receipts equal or exceed $500,000 and the annual interstate purchases exceed $50,000. *El Dorado Club*, 151 NLRB 579; *Hotel Tropicana*, 159 NLRB No. 105; *Thunderbird Hotel*, 152 NLRB 1416; *Thunderbird Hotel*, 144 NLRB 84; *Landrum Mills Hotel Corporation*, 144

contends, however, that it should nevertheless be free of the Act's regulation because the Board has declined to assert jurisdiction over racetracks and their related activities, and this difference in treatment is so arbitrary as to constitute a violation of the due process clause of the Fifth Amendment (Pet. 6-16). The court below properly rejected this contention.

Although both racetracks and gambling casinos are subject to extensive state controls and have other local ties, the fact remains that each involves a distinct and different "class or category of employers" (Section 14(c)(1), n. 11, p. 8, *supra*). Moreover, the Board first decided to decline jurisdiction over racetracks in 1950 (*Los Angeles Turf Club*, 90 NLRB 20), when its budget was more limited than it was in 1963, when the question of asserting jurisdiction over gambling casinos and their related operations first arose.[13] And, although racetracks have restaurant facilities, the connection between casinos and other facilities (*e.g.*, hotels, restaurants, and entertain-

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NLRB 754; *Harrah's Club*, 143 NLRB 1356, enforcement denied on other grounds, 337 F. 2d 177 (C.A. 9).

[13] The first case in which the Board asserted jurisdiction with respect to gambling casinos also involved petitioner's operations; petitioner did not there contest the Board's assertion of jurisdiction. *Harrah's Club*, 143 NLRB 1356, 1357, 1360, enforcement denied on other grounds, 337 F. 2d 177 (C.A. 9).

The Board's continued declination to overturn its prior decision on racetracks does not, of course, undermine the relevance of these historical considerations. *Walter A. Kelley*, 139 NLRB 744; cf. *Radovich* v. *National Football League*, 352 U.S. 445, with *Toolson* v. *New York Yankees*, 346 U.S. 356.

ment) over which the Board would assert jurisdiction independently is generally closer and more pervasive.[14] For these reasons, among others, the Board's policy of asserting jurisdiction over gambling casinos and related facilities in that industry, while declining to do so in the racetrack industry, is not discriminatory in the constitutional sense. See *Currin* v. *Wallace*, 306 U.S. 1, 14; *McGowan* v. *Maryland*, 366 U.S. 420, 426; *Norvell* v. *Illinois*, 373 U.S. 420, 424; *Employing Lithographers of Greater Miami, Florida* v. *National Labor Relations Board*, 301 F. 2d 20, 24-27 (C.A. 5).

In addition, since the Board clearly had legal jurisdiction over petitioner's operations, petitioner has no property or other cognizable legal right to be free of the Act's sanctions with respect to its unfair labor practices. The Board's policy of asserting less than the full measure of its statutory jurisdiction is intended to enable the Board to conserve its budget and manpower, and not to furnish private parties with a guarantee of immunity from the Act's obligations. See *Lucas County Farm Bureau* v. *National Labor Relations Board*, 289 F. 2d 844, 845-846 (C.A. 6), certiorari denied, 368 U.S. 823; *National Labor Relations Board* v. *Stoller*, 207 F. 2d 305, 307 (C.A. 9), certiorari denied, 347 U.S. 919. Thus, even if, contrary to our argument above, there were no relevant differences between racetracks and gambling casinos, petitioner has shown, at most, that the Board erred

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[14] See e.g., *Thunderbird Hotel*, 144 NLRB 84; *Landrum Mills Hotel Corp.*, 144 NLRB 754.

in declining jurisdiction over racetracks and not that petitioner's casino must be exempted. This does not establish a denial of due process as to petitioner.

2. Petitioner also contends that, in affirming the Board's conclusion that Wetherill was discharged because of his union activities, the court of appeals "gave mere lip service" (Pet. 2) to the substantial evidence rule. That contention raises a purely evidentiary issue which does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the facts summarized in the Statement (pp. 3-7, *supra*), and the careful analysis of the record reflected in the opinion of the court below (Pet. App. 11-14), show that the Board was fully justified in finding that petitioner discharged Wetherill because of his union activities, and that the court below properly performed its reviewing function in sustaining that finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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